

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

9 DELANO FARMS COMPANY, a)	No. CV-F-96-6053 OWW/DLB
10 Washington corporation; THE)	MEMORANDUM DECISION GRANTING
11 SUSAN NEILL COMPANY, a sole)	IN PART AND DENYING IN PART
12 proprietorship of Susan)	DEFENDANT'S MOTION FOR
13 Neill; and LUCAS BROS.)	SUMMARY JUDGMENT (Doc. 289)
14 PARTNERSHIP, a California)	AND GRANTING IN PART AND
15 Partnerships,)	DENYING IN PART PLAINTIFFS'
16)	MOTION FOR PARTIAL SUMMARY
17)	JUDGMENT (Docs. 311 & 312)
18)	
19)	
20)	

Plaintiffs,
vs.
THE CALIFORNIA TABLE GRAPE
COMMISSION,

Defendant.

Plaintiffs Delano Farms Company, Susan Neill Company, and Lucas Bros. Partnership (hereinafter referred to as Plaintiffs) have filed a motion for partial summary judgment and/or summary adjudication of issues: (1) regarding the "government speech" defense; (2) whether *Glickman v. Wileman Brothers & Elliott, Inc.* or *United Foods, Inc. v. United States* applies; and (3) whether

1 Central Hudson intermediate scrutiny is not applicable."

2 Defendant California Table Grape Commission (hereinafter referred

3 to as the Commission) has filed a cross- motion for summary

4 judgment on the grounds that (1) requiring Plaintiffs to fund the

5 government speech of the Commission does not implicate the First

6 Amendment; (2) the Ketchum Act is constitutional under *Abood's*

7 "germaneness" test; (3) the Ketchum Act is constitutional under

8 intermediate scrutiny; and (4) Plaintiff's First Amendment rights

9 are not implicated by compelled funding of most of the

10 Commission's activities.

11 A. PROCEDURAL BACKGROUND.

12 Plaintiffs commenced this action in the fall of 1996 by

13 bringing two separate complaints against the Commission,

14 alleging, *inter alia*, that the Commission's regulation and the

15 statute establishing the Commission - the Ketchum Act, California

16 Food & Agric. Code §§ 65500 *et seq.* (the Act) - violate

17 Plaintiffs' rights under the First and Fourteenth Amendments to

18 the United States Constitution and their civil rights under 42

19 U.S.C. § 1983.¹ Plaintiffs initially sought preliminary

20 injunctive relief to permit them to pay the disputed assessments

21 into escrow, and in November 1996 and March 1997, the Court

22 issued two preliminary injunctions granting that relief.

23 In June 1997, the United States Supreme Court decided

24 *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457

25 ¹The other case was No. CV-F-96-6198 OWW/DLB and was
26 consolidated with this case.

1 (1997), reversing the Court of Appeal's decision that reversed
2 the trial court's grant of summary judgment for defendant against
3 the Plaintiff growers who were challenging a generic advertising
4 program for tree fruit under the Agricultural Marketing Agreement
5 Act (AMAA) on First Amendment grounds. The Supreme Court held
6 that because the generic advertising program was germane to a
7 broader regulatory scheme and did not involve the funding of
8 ideological activities, *id.* at 473, it should be reviewed "under
9 the standard appropriate for the review of economic regulation"
10 rather than "under a heightened standard appropriate for the
11 review of First Amendment issues," *id.* at 469.

12 In light of *Glickman*, the Commission sought dismissal of
13 Plaintiffs' complaints under Rule 12(b)(6), Federal Rules of
14 Civil Procedure. In September 1997, Plaintiffs' First Amendment
15 claim was dismissed to the extent that it alleged that the
16 Commission's program as a whole, as opposed to particular acts in
17 administering the program, violated Plaintiffs' rights. (Doc.
18 96). The preliminary injunctions were modified to require
19 Plaintiffs pay 98% of the disputed assessments to the Commission
20 and to pay only 2% into escrow.

21 In 1999, the Court of Appeals for the Sixth Circuit decided
22 *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir.1999),
23 reversing a grant of summary judgment for the United States. The
24 Sixth Circuit distinguished *Glickman* and held that a generic
25 mushroom advertising program was subject to First Amendment
scrutiny. *Id.* at 224-225.

1 In light of the Sixth Circuit's decision in *United Foods*,
2 and contemporaneous Ninth Circuit authority, Plaintiffs moved for
3 reconsideration of the dismissal order. In June 2000, the Court
4 denied Plaintiffs' motion for reconsideration, relying on the
5 Ninth Circuit's recent decisions in *Gallo Cattle Co. v.*
6 *California Milk Advisory Board*, 185 F.3d 969 (9th Cir.1999), and
7 *Cal-Almond Inc. v. U.S. Department of Agriculture*, 192 F.3d 1272
8 (9th Cir.1999), cert. denied, 530 U.S. 1213 (2000),
9 distinguishing the Commission's table grape program from the
10 mushroom program at issue in *United Foods*. (Doc. 125). On
11 August 14, 2000, the parties stipulated to dismiss all remaining
12 causes of action with prejudice except Plaintiffs' cause of
13 action under the First and Fourteenth Amendments and 42 U.S.C. §
14 1983, which the parties and the Court agreed could proceed to
15 appeal. Plaintiffs then appealed to the Ninth Circuit.

16 After briefing in the Ninth Circuit but before any oral
17 arguments or decision, the Supreme Court affirmed the Sixth
18 Circuit's decision in *United Foods*. *United Foods, Inc. v. United*
19 *States*, 533 U.S. 405 (2001). The Supreme Court held that the
20 challenged mushroom advertising program was distinguishable from
21 the tree fruit advertising program in *Glickman*.

22 On January 27, 2003, the Ninth Circuit reversed the
23 dismissal of Plaintiffs' claims in this case. *Delano Farms Co.*
24 *v. California Table Grape Commission*, 318 F.3d 895 (9th
25 Cir.2003).

26 Thereafter, the Commission amended its Answer and Plaintiffs

1 filed a motion for judgment on the pleadings. By Order filed on
2 December 11, 2003, Plaintiffs' motion for judgment on the
3 pleadings was denied. (Doc. 260).

4 The Scheduling Conference Order summarizes the parties'
5 factual and legal contentions. Only the First Cause of Action
6 remains. It alleges that the Ketchum Act violates Plaintiffs'
7 free speech and association rights under the First and Fourteenth
8 Amendments and Section 1983. Plaintiffs seek declaratory and
9 injunctive relief and a refund of their assessments. They
10 further contend that the Ninth Circuit's decision in this case is
11 dispositive and that each of the Commission's affirmative
12 defenses lack legal and factual merit. The Commission contends
13 that it has not violated Plaintiffs' constitutional rights; that
14 the advertisements at issue are government speech and therefore
15 not subject to First Amendment restrictions; or that the program
16 is part of a comprehensive regulatory scheme and therefore exempt
17 from First Amendment scrutiny; or, to the extent that its program
18 is or implicates speech, the program passes scrutiny under
19 *Central Hudson Gas & Electric Corp. v. Public Service Commission*
20 *of New York*, 447 U.S. 557 (1980) and/or *Abood v. Detroit Board of*
21 *Education*, 431 U.S. 209 (1977). The Commission further maintains
22 that the Ketchum Act is severable, and that if any section,
23 clause, or part of the Act, or any part of the Commission's
24 activities, is held unconstitutional, such holding does not
25 affect the remaining portions of the Act or any part of the
26 Commission's activities. The Commission raises a number of

affirmative defenses to defeat Plaintiffs' claims, in whole or in part, including that Plaintiffs are guilty of unclean hands; they have waived any rights regarding any alleged acts or omissions by the Commission; they are estopped from asserting any rights for alleged acts or omissions by the Commission; their claims are barred by the applicable statute of limitations; their claims are barred by the doctrine of laches; they have not been damaged; their assessments have not been spent for non-germane, ideological or political speech; and that Plaintiffs would be unjustly enriched if they are not assessed for the Commission's programs but continue to benefit from them.

B. STANDARDS GOVERNING RESOLUTION OF SUMMARY JUDGMENT OR SUMMARY ADJUDICATION MOTIONS.

Summary judgment is proper when it is shown that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. A fact is "material" if it is relevant to an element of a claim or a defense, the existence of which may affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). Materiality is determined by the substantive law governing a claim or a defense. *Id.* The evidence and all inferences drawn from it must be construed in the light most favorable to the nonmoving party. *Id.*

The initial burden in a motion for summary judgment is on the moving party. The moving party satisfies this initial burden

1 by identifying the parts of the materials on file it believes
2 demonstrate an "absence of evidence to support the non-moving
3 party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325
4 (1986). The burden then shifts to the nonmoving party to defeat
5 summary judgment. *T.W. Elec.*, 809 F.2d at 630. The nonmoving
6 party "may not rely on the mere allegations in the pleadings in
7 order to preclude summary judgment," but must set forth by
8 affidavit or other appropriate evidence "specific facts showing
9 there is a genuine issue for trial." *Id.* The nonmoving party
10 may not simply state that it will discredit the moving party's
11 evidence at trial; it must produce at least some "significant
12 probative evidence tending to support the complaint." *Id.* The
13 question to be resolved is not whether the "evidence unmistakably
14 favors one side or the other, but whether a fair-minded jury
15 could return a verdict for the plaintiff on the evidence
16 presented." *United States ex rel. Anderson v. N. Telecom, Inc.*,
17 52 F.3d 810, 815 (9th Cir.1995). This requires more than the
18 "mere existence of a scintilla of evidence in support of the
19 plaintiff's position"; there must be "evidence on which the jury
20 could reasonably find for the plaintiff." *Id.* The more
21 implausible the claim or defense asserted by the nonmoving party,
22 the more persuasive its evidence must be to avoid summary
23 judgment." *Id.* As explained in *Nissan Fire & Marine Ins. Co. v.
Fritz Companies*, 210 F.3d 1099, 1102-1103 (9th Cir.2000):

25 The vocabulary used for discussing summary
judgments is somewhat abstract. Because
26 either a plaintiff or a defendant can move

for summary judgment, we customarily refer to the moving and nonmoving party rather than to plaintiff and defendant. Further, because either plaintiff or defendant can have the ultimate burden of persuasion at trial, we refer to the party with and without the ultimate burden of persuasion at trial rather than to plaintiff and defendant. Finally, we distinguish among the initial burden of production and two kinds of ultimate burdens of persuasion: The initial burden of production refers to the burden of producing evidence, or showing the absence of evidence, on the motion for summary judgment; the ultimate burden of persuasion can refer either to the burden of persuasion on the motion or to the burden of persuasion at trial.

A moving party without the ultimate burden of persuasion at trial - usually, but not always, a defendant - has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment ... In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial ... In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact

If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial ... In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything ... If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense ... If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the

1 motion for summary judgment ... But if the
2 nonmoving party produces enough evidence to
3 create a genuine issue of material fact, the
nonmoving party defeats the motion.

4 1. BURDEN OF PROOF.

5 Plaintiffs assert the following contentions regarding the
6 respective burdens of proof in connection with these motions:

7 Since the [Supreme] Court made clear in
8 *United Foods and Johanns*, that it is
Defendant's burden of proof re 'government
speech,' the Table Grape Commission must
persuade this Court, through undisputed
material facts that the Table Grape
Commission law and its operations are
government speech ... Further, Plaintiffs, as
the moving party with respect to this motion,
carry their initial burden of summary
judgment by 'showing' that the Table Grape
Commission lacks sufficient evidence to carry
its ultimate burden of persuasion at trial
with respect to not only the government
speech affirmative defense, but that
Glickman, not *United Foods* applies. That is
because those are affirmative defenses.

15 The Commission argues that Plaintiffs are wrong about which
16 party has the burden of proving that the Commission's speech is
17 government speech and that the table grape industry is
18 collectivized:

19 ... *Wileman Bros. and Livestock Marketing*
20 make clear that the First Amendment is not
even implicated if the table grape industry
is collectivized or if the speech of the
Commission is government speech. In order to
make a First Amendment claim, Plaintiffs must
show that the First Amendment is at least
implicated by the challenged speech, and it
is therefore Plaintiffs' burden to
demonstrate that the table grape industry is
not collectivized and that the speech of the
Commission is not government speech.

26 Noting that Rule 8(c), Federal Rules of Civil Procedure lists

1 specific affirmative defenses, including "any other matter
2 constituting an avoidance or affirmative defense", the Commission
3 cites *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080,
4 1088 (9th Cir.2002) :

5 A defense which demonstrates that plaintiff
6 has not met its burden of proof is not an
affirmative defense. See *Flav-O-Rich v.*
7 *Rawson Food Services, Inc. (In re Rawson Food*
Services, Inc.), 846 F.2d 1343, 1349 (11th
8 Cir.1988) (recognizing that a defense which
points out a defect in the plaintiff's prima
facie case is not an affirmative defense).

9 The Commission correctly asserts the burden of proof is on
10 Plaintiffs. Plaintiffs have the burden to prove that the
11 Commission's program pursuant to the Ketchum Act is subject to
12 the First Amendment and that the program violates the First
13 Amendment.

14 C. STATEMENTS OF UNDISPUTED FACTS.

15 The parties' Undisputed Stipulated Facts are 63 pages long
16 and include 170 separately numbered paragraphs containing a
17 multitude of facts.

18 The Commission's Statement of Undisputed Facts is 83 pages
19 long, is comprised of 235 facts (with numerous subparts) and has
20 a table of contents. Plaintiffs' Objections and Response to the
21 Commission's Statement of Undisputed Facts is 137 pages long, and
22 uses the following abbreviated keys: "'Stip.' stands for
23 stipulated; 'Undis.' stands for undisputed; 'Disp. stands for
24 disputed; 'Obj.' stands for objection; and 'Rel.' stands for not
25 relevant." In addition, Plaintiffs assert:

When Plaintiffs ... respond with an undisputed, it is only for the purposes of the instant cross-motions for summary judgment, and Plaintiffs reserve the right, at trial, or any further additional motions for summary judgment to dispute the same alleged fact, or to object, or object on other or additional grounds. In addition, when Plaintiffs and Defendant stipulated to various facts, it was done on the condition that any fact 'stipulated' to could be explained, expounded upon, or state how things were different or have changed.

Also, to the greater extent, Plaintiffs' objections to or disputes with the Commission's Statement of Undisputed Facts are string-cite objections, i.e., not relevant, hearsay, lack of foundation, improper lay opinion, conclusory, violation of best evidence rule, with no supporting law or analysis.

Plaintiff's Statement of Undisputed Facts is 8 pages long and is comprised of 43 facts.

Because of the magnitude of the factual positions of the parties, in the interests of economy, a separate Statement of Undisputed Facts will not be provided, instead the relevant undisputed facts and certain disputed facts necessary to ruling on the motions will be included in this Memorandum Decision.

D. UNDISPUTED STIPULATED FACTS.

1. California has the largest agricultural production of any state in the nation.

2. The California Department of Food and Agriculture ("CDFA") estimated that in 2004, California's growers produced almost \$32 billion in agricultural commodities, valued at the farm-level.

1 3. Of that figure, grape growers as a whole, including wine,
2 raisin, and table type grapes, accounted for 8.6%.

3 4. The volume of California table grapes shipped has
4 increased from the equivalent of approximately 37 million 19-
5 pound boxes of grapes per year when the Commission was first
6 created to approximately 94 million 19-pound boxes in 2005.

7 5. Approximately 97% - 99% of the table grapes grown in the
8 United States are grown in California.

9 6. The total F.O.B. value (value at the point of shipping
10 including picking, packing, and extra services such as cold
11 storage and placing on pallets, as voluntarily reported to the
12 United States Department of Agriculture ("USDA")) of the
13 California table grapes shipped to buyers
14 in 2004 was just over \$1 billion.

15 7. Table grapes are grown in California in the Coachella and
16 San Joaquin valleys on approximately 110,000 acres of land.

17 8. According to the United States Department of Agriculture,
18 farm and farm-related employment accounted for 2.75 million jobs
19 in California in 2002—over 13.8 % of the state's total
20 employment.

21 9. In sum, agriculture and the table grape industry are
22 important parts of the California economy.

23 10. At present, there are 35 active federal regional
24 marketing orders in place and 17 national programs that cover
25 blueberries, beef, cotton, dairy, eggs, milk, Hass avocados,
26 honey, lamb, mangoes, mushrooms, peanuts, popcorn, pork,

1 potatoes, soybeans, and watermelons.

2 11. In addition to the federal marketing orders covering the
3 state, California currently has 53 active commodity marketing
4 programs. These programs cover about 65% of the value of
5 California's agricultural production, and include programs for
6 four of California's top five agricultural products (dairy
7 products, greenhouse/nursery products, grapes, almonds, and
8 cattle/calves).

9 12. The California Table Grape Commission was established in
10 1967 by an act of the California Legislature called the Ketchum
11 Act. Its purposes include expanding and maintaining demand for
12 California table grapes worldwide and preventing economic waste
13 of the agricultural wealth of the State of California. The
14 California Legislature has also declared that the Commission's
15 activities (and those of other commissions) are essential to the
16 goals and interests of the State of California in, among other
17 things, marketing research and trend analysis, elimination of
18 tariff and non-tariff barriers, consumer education relating to
19 the health and other benefits of consuming agricultural products,
20 and "[c]ooperative crisis resolution."

21 13. The Commission is comprised of 18 commissioners
22 representing the six active table grape growing districts in the
23 State of California and one "public member," all of whom are
24 appointed and subject to removal by the Secretary of the
25 California Department of Food and Agriculture ("CDFA"). Prior to
26 appointment, the CDFA inquires into whether potential

1 commissioners are suitable for appointment.

2 14. The Commission's work is funded primarily through
3 assessments that are imposed on all shipments of California table
4 grapes pursuant to the Ketchum Act. Those assessments are
5 paid to the Commission by shippers who are authorized to collect
6 the assessments from the grower of the fruit shipped.

7 15. The Commission office is located in Fresno, California,
8 where it employs 17 people. It has one employee in Texas. In
9 addition, the Commission contracts for the services of a number
10 of consultants, including one domestic representative who works
11 out of Canada and international representatives in Australia, New
12 Zealand, the United Kingdom, Germany, Japan, South Korea, Hong
13 Kong, Singapore, India, Venezuela, Costa Rica, Mexico, the
14 Philippines, Taiwan, and the United Arab Emirates.

15 16. The Commission's fiscal year runs from May 1 to April
16 30. The 2004-2005 fiscal year therefore closed on April 30, 2005.
17 The Commission's expenditures for the 2004-2005 fiscal
18 year were \$12,015,653. Its adjusted carryover and revenue was
19 \$12,497,031. Assessments paid to the Commission (and not into an
20 escrow account) for California table grapes shipped
21 in 2004-2005 accounted for \$8,367,429 of that amount. The
22 remaining revenues came principally from federal international
23 marketing grants.

24 17. The season for California table grapes runs from May
25 through January. In the early part of the season, retailers
26 purchase grapes grown in the Coachella Valley of California.

1 During this early part of the California season, late season and
2 storage table grapes from Chile and South Africa are still in the
3 market and new crop grapes from Mexico have entered the
4 market. As the season progresses, California table grapes from
5 the Bakersfield area and then farther north are available. By the
6 middle of July, usually only California table grapes are in
7 the domestic market. By November, grapes from a number of
8 southern hemisphere countries (including Brazil, Peru, and Chile)
9 are back in the market.

10 18. There are at least four different principal paths for
11 California table grapes to travel from the vineyard to the final
12 end retail consumer in the domestic market.

13 19. All four principal paths start with a grower who
14 harvests the table grapes and a shipper who packs the grapes and
15 finds a first buyer for them. Sometimes growers act as their own
16 shippers. Other times growers contract with a separate entity to
17 act as the shipper.

18 20. All four principal paths end with a retailer making a
19 sale to a customer. While there are different kinds of retailers
20 (large supermarket chains, mom-and-pop grocery stores, fruit
21 stands, farmers' markets etc.), the vast majority of grapes are
22 sold by large retail chains such as Safeway, Albertson's, Kroger,
23 or Wal-Mart.

24 21. The distinction between the four principal paths is in
25 how the grapes go from the grower/shipper to the retailer.

26 a. The first path is directly from shipper to retailer.

1 For large retailers, such as Vons, this is the most common way to
2 purchase grapes. Approximately 70% of all California grapes sold
3 in the United States travel along this path.

4 b. The second path is from shipper to a broker and then
5 to a retailer. The broker may or may not take ownership or
6 physical custody of the grapes. Approximately 10% of all
7 California grapes sold in the United States travel along this
8 path.

9 c. The third path is from shipper to a distributor and
10 then from the distributor to the retailer. The distributor may
11 take physical possession of the grapes and generally
12 takes ownership of the grapes. Approximately 10% of all
13 California grapes sold in the United States travel along this
14 path.

15 d. Finally, the fourth path is from shipper to
16 "terminal market wholesalers." As the name suggests, these
17 wholesalers operate in so-called "terminal markets"—generally
18 large cities where a large volume of grapes is sold. Terminal
19 market wholesalers take physical possession of the grapes and
20 most often take ownership of them. Approximately 10% of all
21 California grapes sold in the United States travel along this
22 path.

23 22. California grapes travel along similar paths to
24 consumers in international markets.

25 23. Although there are four distinct paths along which
26 California table grapes generally travel from vineyard to

1 consumer, there are ultimately two distinct markets for
2 California table grapes. First, there is the market in which
3 retailers and wholesalers purchase California table
4 grapes from grower/shippers (the "wholesale market"). Second,
5 there is the market in which consumers purchase California table
6 grapes from retailers (the "retail market"). These
7 markets operate very differently.

8 24. Produce retailers, such as supermarket chains like Vons,
9 purchase table grapes in the wholesale market, either from
10 grower/shippers, brokers, distributors, or wholesalers.
11 Retailers make four principal decisions when participating in the
12 wholesale market: (1) what quantity of table grapes to put on
13 their shelves, (2) from which production area (Chile,
14 Mexico, California) to buy table grapes, (3) from which specific
15 shippers to buy table grapes, (4) and what price they will pay.
16 Retailers also consider the color and level of fruit quality
17 (e.g., "A" box, "B" box, etc.) of the grapes they sell and
18 whether grapes are seedless.

19 25. In deciding what quantity of table grapes to put on
20 their shelves and where to put them, retailers must weigh the
21 value of selling grapes versus the value of selling other
22 products. Every square foot allocated to table grapes means one
23 less square foot allocated to something else in the produce
24 department. And every square foot allocated to produce is one
25 square foot less available in the store for toothpaste, coffee,
26 and everything else.

1 26. California table grapes compete with grapes from other
2 countries (during certain parts of the year) and other fruits
3 (like apples) for shelf space within the produce department.
4 California table grapes and other "snack" produce also compete
5 with "salty snacks," like potato chips and pretzels and with
6 snacks like candy and ice cream, for overall snack shelf space.

7 27. Competition for shelf space between different types of
8 produce and among different types of products (produce vs. dairy,
9 for example) is fierce. There is competition across departments
10 and within departments. Foods and non-foods compete for space.
11 Moreover, there is competition for the best shelf space in a
12 grocery store.

13 28. The goal of individual grower/shippers of table grapes
14 is to obtain the highest price and maximize their own sales. That
15 is, individual grower/shippers are interested only in
16 expanding their slice of the overall table grape market.

17 29. Every year, each grower/shipper has different levels of
18 fruit quality to sell to his/her customers. A common method of
19 identifying quality is to designate a box of grapes as an
20 "AA" box (highest quality), an "A" box, a "B" box, and a "C" box.
21 Most grower/shippers offer all four levels. It is possible for
22 different grower/shippers to have more-or less-of
23 the highest quality fruit than their competitors. A particular
24 grower/shipper may generally have a higher percentage of the
25 highest quality fruit than another grower/shipper. But it is
26 possible for that grower/shipper to suffer from adverse weather

1 patterns in a particular year and thus have less highest quality
2 fruit than the grower/shipper whose fruit is generally not as
3 good.

4 30. Consumers do not shop for grapes with brand names in
5 mind. Rather, table grape consumers consider primarily the
6 ripeness and freshness (*i.e.*, quality) of the grapes, the taste
7 of the grapes, the variety and whether the grapes are seeded, and
8 the price of the grapes.

9 31. Consumer survey evidence indicates that when shoppers
10 buy produce generally, brand is typically not an important
11 factor. While for some types of produce, such as bananas and
12 oranges, brand is more important than it is for grapes, it is
13 still subordinate to a host of other factors like ripeness and
14 freshness (*i.e.*, quality), color, and price.

15 32. In large retail stores, grapes are typically not sold in
16 their boxes, so customers never see the labels on those boxes.
17 Store signage typically does not indicate the name of the
18 grower/shipper of the table grapes being displayed. And most of
19 the time grapes' packaging does not reveal the grower/shipper's
20 name.

21 a. In general, most retailers do not want the produce
22 they sell to be branded. They find branding on packaging clutters
23 their produce section and confuses consumers because of the
24 different print sizes, colors, and logos fighting for the
25 consumer's eye. Retailers want the grapes themselves to be the
26 focus of the consumer's eye. For a product like table

1 grapes—which are produced at different times of the year by
2 different growers in different parts of the world and are shipped
3 to market by multiple shippers who each have multiple labels—this
4 problem of customer confusion is exacerbated. Retailers do not
5 want to be tied to any one grower/shipper or any one label
6 because throughout the year a retailer will buy its grapes from a
7 number of different grower/shippers, both domestic and
8 international.

9 33. In general, there is less consumer recognition of brands
10 of produce than other food products.

11 34. Individual California table grape growers and shippers
12 conduct virtually no direct advertising to consumers in the
13 retail market.

14 35. To achieve its statutory objective of maintaining and
15 expanding demand for California table grapes worldwide,
16 preventing economic waste of the agricultural wealth of the State
17 of California, and promoting the health of the people of
18 California, the Commission conducts a variety of activities that
19 fall into five general categories: (1) Research, (2) Trade
20 Management, (3) Issues Management, (4) Advertising, and (5)
21 Education/Outreach.

22 36. The Commission's research activities are broad ranging
23 and include consumer, trade, viticulture, industry statistical,
24 and nutrition research.

25 a. In 2004-2005, the Commission spent \$1,776,950 in
26 assessment dollars on research.

1 37. The Commission's trade management activities focus on
2 working with the retail and wholesale produce trade, domestically
3 and internationally, to create demand for the volume
4 of fresh California grapes grown each season.

5 a. Using the results of its category management
6 (discussed below) and consumer research, as well as analysis of
7 retail chain activities (in the aggregate and individually) and
8 using financial and/or media incentives, the Commission works
9 around the year to attempt to create demand for California table
10 grapes.

11 b. In 2004-2005, the Commission spent \$1,987,783 in
12 assessments on trade management.

13 38. The Commission's issue management work is varied, as the
14 issues that might impact demand for the crop can vary week-to-
15 week, month-to-month, and season-to-season.

16 a. Issue management is an important element of all
17 demand-creation work.

18 b. Fundamentally, the focus of issue management is
19 working with interested parties and decision makers to keep trade
20 flowing both in the United States and internationally, and to
21 respond to short-term incidents and long-term issues that could
22 impair the economic strength of California's fresh grape
23 industry.

24 c. Specifically, issue management typically involves
25 working with other governmental agencies at the county, state,
26 and federal levels and their counterparts in export markets-as

1 well as with industry groups, health authorities, and non-
2 industry organizations.

3 d. It involves using a variety of disciplines to ensure
4 the long-term continued movement of fresh California grapes from
5 field to market.

6 e. Categories of issue management on which the
7 Commission works on an ongoing basis include (but are not limited
8 to) food safety, market access, tariff reduction, standardization
9 of packaging, labeling, pesticide registration, pest
10 infestations, and all litigation involving the Commission. Within
11 each category numerous types of issues can, and do, arise.

12 f. In 2004-2005, the Commission spent \$1,493,192 in
13 assessment dollars on issue management.

14 39. The Commission conducts advertising campaigns to reach
15 consumers with paid messages designed to increase overall demand
16 for fresh California grapes.

17 a. Paid media is used in an attempt to keep fresh
18 California grapes "top-of-mind" for consumers in a way that
19 motivates increased purchase.

20 b. The messages revolve around healthy snacking,
21 positioning grapes as a healthy alternative to products like
22 buttered popcorn, fries, and ice cream. This message is
23 intended to increase demand but also furthers the state interest
24 in public health.

25 c. In 2004-2005, the Commission spent \$2,032,440 in
26 assessment dollars on paid advertising.

1 40. The Commission's education and outreach activities are
2 designed to provide education, training, analysis, and general
3 information to retailers, wholesalers, foodservice operators,
4 grower/shippers, researchers, consumers, and others such as
5 teachers, editors, authors, doctors, and nutritionists.

6 a. The Commission provides information about, among
7 other things, nutrition, usage, storage, handling, availability,
8 retail merchandising techniques, product characteristics,
9 technological advances, and statistical analysis through a
10 variety of outreach methods.

11 b. This work is intended to increase demand. Credible
12 information is required by those who make decisions about what
13 products to place on grocery shelves, what nutritional
14 information to share with patients or clients, what foods to
15 include in classroom lessons, what foods to include in restaurant
16 menu items, what to advise readers about recipes or storing and
17 handling of food, and what to advise viewers to watch for in
18 terms of quality and safety.

19 c. In 2004-2005, the Commission spent \$847,619 in
20 assessment dollars on education and outreach.

21 41. The Commission operates five principal ongoing programs:
22 Viticulture and Technical Issues, Advertising, Domestic
23 Marketing, International Marketing, and Consumer Education.
24 Each program involves activities that fall within one or more of
25 the categories described above in paragraphs 36-40.

26 42. The viticulture and technical issues program has three

1 areas of focus: viticulture research, technical issues
2 management, and patenting/licensing. The program includes
3 activities falling within the following categories: research,
4 issue management, and education and outreach.

5 43. The viticulture research program involves directing and
6 overseeing the funding and implementation of viticulture research
7 performed by scientists from a variety of research institutions
8 including the University of California, USDA, and California
9 State University. The research is designed to increase grower
10 efficiency and improve table grape production
11 and fruit quality.

12 a. The Commission has developed a process for receiving
13 and evaluating research proposals.

14 b. The program includes the funding of cultural
15 (horticultural farming) practices research that is intended to
16 improve fruit maturity, storability, and overall quality. It
17 includes work in areas such as pruning techniques, trellising/
18 training methods, crop/cluster and canopy management, crop load
19 regulation, and irrigation strategies.

20 c. The program also includes the funding of pest and
21 disease management research. Research studies in this category
22 attempt to develop biological and reduced-risk chemical control
23 methods for destructive vineyard pests and diseases such as
24 mealybugs, molds/mildews and grapevine measles. Biological
25 control methods being examined include releasing beneficial
26 insect predators or parasites to reduce the targeted pest

1 population and using pheromones or sex attractants to disrupt
2 mating cycles. The Commission also funds research regarding the
3 application of reduced risk pesticides that target harmful pests
4 without eliminating beneficial insects.

5 d. The program also funds post-harvest research. The
6 research is intended to improve storing, handling/shipping
7 procedures, shelf life, and overall fruit quality. It includes
8 research on modernizing storage room and phytosanitary
9 fumigations, temperature/humidity requirements, and new packaging
10 methods.

11 e. Finally, the program funds new grape and grape
12 rootstock variety research. The goal of this research is the
13 development and evaluation of new varieties of grapes and
14 grapes rootstocks with improved characteristics and pest/disease
15 resistance.

16 i. The Commission has been funding efforts to
17 breed new, better varieties of table grapes since the inception
18 of the research program in 1972, first with the University of
19 California and then with USDA. The Commission currently
20 supports the USDA's table grape variety breeding program run by
21 Dr. David Ramming, providing approximately one-third of the
22 program's funding.

23 ii. Since the Commission began funding the USDA
24 program and advising its breeder in 1981, it has developed over
25 10 new varieties of grapes that are currently being marketed,
26 including the Crimson Seedless variety that constitutes over half

1 of Delano Farms' sales as well as the Princess variety
2 sold by Delano Farms.

3 f. The Commission makes the results of its viticulture
4 research available to grower/shippers in a number of ways that
5 include seminars, field tours, newsletters, and publications.
6 (The new varieties are made available through the patenting and
7 licensing program described below.)

8 44. Technical issues management encompasses the Commission's
9 work related to pesticides, pest exclusion, production,
10 packaging, distribution, and quarantines. It includes technical
11 analysis related to the Commission efforts to expand
12 international market access by, among other things, developing
13 international shipping protocols and participating in trade
14 barrier negotiations.

15 a. The Commission monitors chemical Maximum Residue
16 Level ("MRL") restrictions proposed by other countries or the
17 international standard-setting body (the Codex Alimentarius
18 Commission) to determine whether the chemicals to be regulated
19 are registered for use on grapes in California and are in fact
20 used, whether the proposed MRL is lower than the U.S. or the
21 Codex MRLs, and if so whether the proposed MRL is likely to
22 disrupt shipments of California table grapes to the country in
23 question. Depending on what is learned, the Commission works
24 with the U.S. government and the country involved to negotiate
25 the best possible solution for California's table grape
26 grower/shippers.

1 b. The Commission also conducts research to support its
2 efforts to develop and streamline shipping protocols that allow
3 California table grapes to access foreign markets. The research
4 can also support efforts to eliminate those protocols when they
5 are no longer necessary.

6 45. The patenting and licensing program revolves around the
7 Commission's efforts to develop new varieties of table grapes
8 jointly with the USDA and to protect the intellectual property
9 developed through U.S. patents, international plant protection,
10 and domestic and international licenses.

11 a. In 2001, the Commission and USDA signed a Memorandum
12 Of Understanding that outlined an agreement to patent future
13 USDA-developed table grape varieties with the intent that the
14 Commission will become the exclusive licensee of the varieties in
15 domestic and international markets.

16 b. In 2004 and 2005, at the recommendation of the
17 Commission, the USDA sought patent protection for and then
18 released three newly developed varieties of grapes: Sweet
19 Scarlet, Scarlet Royal, and Autumn King. The USDA has already
20 obtained patents for the Sweet Scarlet and Scarlet Royal
21 varieties, and patent is pending for the Autumn King variety.

22 c. As the exclusive licensee, the Commission, in turn,
23 has sublicensed the varieties to a number of nurseries that sell
24 the varieties to any domestic grower that wishes to purchase
25 them. The amount of domestic production of the newly developed
26 varieties is not limited. Nurseries that wish to sell the new

1 varieties, however, must pay the Commission a yearly fee and a
2 per-vine fee, a portion of which is remitted to the USDA.

3 d. The Commission is also charged with applying for
4 intellectual property protection abroad, setting the terms on
5 which the new varieties are made available abroad, and enforcing
6 foreign intellectual property rights obtained.

7 46. In 2004-2005, the Commission's viticulture and
8 technical issues program spent \$807,377 in assessment dollars on
9 the following categories of activities \$548,711 on viticulture
10 research, \$12,370 on outreach, and \$246,296 on issue management.

11 47. Since the Commission began funding the USDA breeding
12 program, USDA has developed 10 new varieties of grapes that are
13 currently being marketed and two varieties that are not yet in
14 production. Together, the 10 varieties being currently marketed
15 account for approximately 30% of California grape shipments.

16 48. The following varieties were developed under the joint
17 USDA/Commission program: Autumn Seedless, Autumn Black, Crimson
18 Seedless, Autumn Royal, Fantasy Seedless, Fresno Seedless, Black
19 Emerald, Princess, Summer Royal, Sweet Scarlet, Scarlet Royal
20 (not yet in production) and Autumn King (not yet in production).

21 49. The Commission has also helped to fund the development
22 of the Red Globe and Christmas Rose varieties. In total,
23 varieties funded by the Commission account for approximately 45%
24 of the volume of California table grapes shipped to market, and
25 California produces approximately 97% - 99% of the commercially
26 grown table grapes in the United States.

1 50. The Commission's initiative to obtain patent protection
2 for newly developed varieties has the potential to be beneficial
3 to the California table grape industry.

4 a. As the exclusive licensee of varieties patented by
5 the USDA, the Commission attempts to ensure that varieties
6 developed by California growers are not misappropriated by
7 foreign growers to unfairly compete with California grapes. The
8 Commission also attempts to ensure that the genetic quality of
9 the new varieties is maintained.

10 51. The California Legislature has directed the Commission
11 to undertake advertising that "promote[s] the sale of fresh
12 grapes" and the Commission has consistently followed that
13 legislative directive.

14 52. The consumer advertising undertaken by the Commission
15 is known as "generic advertising" because it promotes the entire
16 category of fresh grapes from California. It does not specify
17 any one type of fresh California grape or any one producer of
18 fresh California grapes. Instead, it speaks to the general
19 characteristics of all fresh California grapes—that they are
20 flavorful, convenient, and healthful.

21 53. All of the Commission's radio, television, print media,
22 and billboard advertisements are intended to "promote the sale of
23 fresh grapes." Commission advertisements have not promoted
24 products other than grapes and have not disparaged other
25 California agricultural products. The Commission has not run
26 political or ideological advertisements, and all of the

1 Commission's advertisements have been in good taste and have not
2 been false or misleading.

3 54. The development of the Commission's advertising
4 campaign begins with consumer research.

5 a. Initially, secondary research on consumer attitudes
6 and buying habits is obtained from a variety of sources to
7 determine the general consumer mindset about the foods
8 they purchase and consume.

9 b. Next, the Commission conducts primary research to
10 determine how consumers view grapes, why they do and do not
11 purchase them, where and when they purchase them, what they look
12 for when purchasing grapes, how, when and where they consume
13 them, their specific views of fresh grapes from California as
14 opposed to grapes from other sources, what foods they might
15 consume instead of fresh California grapes, and what qualities
16 about fresh California grapes are most and least motivating for
17 their purchase and consumption of fresh California grapes.

18 55. The research is then analyzed by the Commission staff
19 and its advertising agency—currently McCann Erickson, San
20 Francisco—to develop potential advertising messages to "promote
21 the sale of fresh grapes" and the most effective medium to
22 transmit that message. The potential messages are then taken to
23 additional focus groups to determine their effectiveness
24 in motivating consumers to purchase and consume more fresh
25 California grapes.

26 56. The current advertising campaign takes into account the

1 fact that fresh California grapes are consumed primarily as a
2 snack and emphasizes that fresh California grapes are a more
3 healthful alternative to other snack food such as ice cream,
4 french fries, chips, and buttered popcorn.

5 57. The advertising is done primarily in outdoor billboards
6 and in 10-second traffic radio commercials. The Commission also
7 ran a limited amount of television advertising in the fall
8 of 2005 on the Food Network.

9 58. The Commission's outdoor billboards use beautiful
10 images of grapes contained in packaging typically associated with
11 less healthful snack foods such as popcorn, potato chips, french
12 fries, and ice cream to remind consumers that grapes are a
13 healthy alternative to these other snack foods.

14 a. In 2005, the Commission ran 284 billboards for
15 seven months. The billboards were placed in the following major
16 markets: Baltimore, Boston, Chicago, Dallas-Ft. Worth, Denver-
17 Boulder, Los Angeles, New York, Philadelphia, San Francisco, and
18 Seattle-Tacoma. On average, there were 18 billboards in each
19 market.

20 59. The Commission's radio advertisements are in the form
21 of short radio messages that air during radio traffic reports
22 when consumers are thought to be paying close attention to what
23 they hear on the radio. The messages remind consumers where to
24 go to get the fresh California grapes they enjoy and encourage
25 consumers, while they are out on the road, to stop into the
26 featured store and buy grapes. Like the billboards, these

1 advertisements emphasize that California table grapes are a
2 healthy alternative to other snack foods.

3 a. One script, for example, reads: "Hold the burger,
4 the fries, and the shake and drive up to (Name of Store) because
5 the fresh California grapes are in season now. This is
6 your window to pick up the grapes everyone likes best—at your
7 local (Name of Store)."

8 b. Another reads: "Have a sweet tooth that won't let
9 go? Forget the ice cream and head to (Name of Store). Scoop up
10 a bunch of sweet, fresh California grapes from (Name of Store)
11 and in a few luscious bites you'll know why California grapes are
12 preferred over any other."

13 c. Other radio scripts emphasize the health benefits
14 of table grapes more generally. One reads: "It's easy to get
15 your recommended five servings of fruits and vegetables a
16 day with fresh California grapes. They come in three colors and
17 fresh California grapes from (Name of Store) are part of a smart,
18 healthy diet. Pick up some sweet, delicious grapes from (Name of
19 Store) and live better."

20 60. In 2004 and 2005, the Commission ran two 15-second
21 advertisements on the cable channel the Food Network during the
22 seven-day-a-week cooking program "Sara's Secrets" featuring
23 renowned chef Sara Moulton.

24 a. The television advertisements, like the billboards
25 and radio advertisements, emphasized that grapes are a healthy
26 alternative to traditional snack foods.

1 b. One advertisement showed three colors of grapes in
2 an ice cream cone and the other shows grapes in a popcorn bag. A
3 voiceover declared that "Good Things Come in Bunches."

4 61. Past themes of the Commission's advertising include:
5 (a) "Good things come in bunches."; (b) "Share some California
6 grapes."; (c) "Life is complicated. Grapes are simple."; and (d)
7 "California grapes. The Natural Snack."

8 62. The Commission's advertising is designed to be as
9 motivating to consumers as possible, but it is also used as an
10 incentive for retailers.

11 63. The Commission's advertising is meant to work in
12 conjunction with the Commission's other efforts.

13 a. The Commission's efforts with retailers are
14 intended to "push" California table grapes into the stores, and
15 the Commission's advertising is intended to "pull" consumers into
16 the stores to buy the grapes.

17 b. Similarly, the Commission's advertising is intended
18 to build on the research efforts of the Commission. The current
19 advertising campaigns emphasize the health benefits of
20 table grapes and the Commission's research efforts are focused,
21 in part, on discovering and documenting the health benefits of
22 grapes.

23 64. In 2004-2005, the Commission's advertising program
24 spent \$2,042,247 in assessment dollars on the following
25 categories of activities: \$229,003 on consumer research and
26 \$1,813,244 on direct advertising.

1 65. Most of the advertising on television, in print, or on
2 the radio is "branded product" advertising. Advertising for
3 "Pepsi" soda, "Tide" laundry detergent, and "Crest" toothpaste
4 are familiar examples. The goal of this type of advertising is
5 almost entirely to increase sales of the particular product
6 advertised, not to increase overall consumption of a category of
7 product.

8 66. Product differentiation can stem from actual
9 differences between products—the Microsoft Windows operating
10 system works differently from the operating systems of its
11 competitors. Or product differentiation can result from an
12 extensive advertising campaign that creates perceived differences
13 between products—some consumers prefer Coke while others prefer
14 Pepsi, yet the actual differences between the products may be
15 slight.

16 67. The California table grape industry is estimated to
17 have 550 growers currently, including grower-shippers. Large
18 growers have market shares only in the single digits.

19 68. Unlike "branded product" advertising, which often seeks
20 to create preferences in the minds of consumers even absent
21 substantial differences in the products sold, generic advertising
22 often promotes actual characteristics of a category of products.
23 Table grapes, for example, are promoted for their health
24 benefits, convenience of consumption, and good taste.

25 69. Generic regional advertising is intended to promote all
26 table grapes from a particular region, such as California. This

1 advertising is still generic in that it does not distinguish
2 between different California producers, but it does seek to
3 distinguish California table grapes from grapes grown in other
4 regions.

5 70. Generic regional advertising allows producers in a
6 region who feel they are too small to run their own advertising
7 to band together and fund efforts to run advertisements focusing
8 on the general attributes of the category of products.

9 71. Economists have been modeling and measuring the impacts
10 of commodity programs for at least 20 years.

11 72. The Commission's current advertising campaign
12 ("Snacks") was designed to target women aged 25 to 54 and to
13 convey the message that grapes are a healthy alternative to other
14 snack foods based on market data that revealed that the primary
15 shoppers in most households are women in that age range and these
16 women were concerned with providing healthy, tasty, convenient
17 foods to their families.

18 73. According to consumers in focus group studies, the
19 Commission's generic "California" advertising campaign motivates
20 consumers to want to purchase more California table grapes.

21 74. In a focus group study, the "Snacks" campaign was
22 viewed favorably by participants. All participants readily
23 discerned the message that grapes are a healthy alternative to
24 other snack foods.

25 a. Participants described the campaign as "brilliant"
26 and "clever." People selected the words, "happy," "pleased,"

1 "surprised," "playful," "joyful," "amused," "interested,"
2 and "delighted" to describe their feelings to this campaign. The
3 campaign appeals to adults as individuals and as parents. And
4 the campaign is intended to make consumers think about grapes in
5 a new way, establishing in their minds more occasions for using
6 grapes.

7 75. Any additional revenue to farmers that might be
8 realized due to the Commission's advertising, trade management,
9 and education and outreach generally results in additional
10 jobs in the agricultural industry.

11 76. Like other states, California and its citizens face a
12 number of significant health problems related to poor diets.

13 a. For example, more than half of California adults
14 are overweight or obese. Physically inactive, obese, and
15 overweight individuals cost California billions of dollars every
16 years in medical care, workers' compensation, and lost
17 productivity.

18 b. Heart disease is the leading cause of death in
19 California and the nation. In 1999, there were almost 60,000
20 deaths due to heart disease in California.

21 c. Stroke is the third leading cause of death in
22 California and the nation. In 1999, there were approximately
23 18,000 deaths due to stroke in California.

24 d. Cancer is the second leading cause of death in
25 California and the nation. Cancer accounted for approximately 25%
26 of all deaths in California in 2002.

1 e. Diabetes is also as significant health problem
2 afflicting Californians and Americans generally.

3 77. Eating more fruits and vegetables helps to reduce
4 diseases. Eating five to nine servings of fruit and vegetables
5 each day helps protect against heart disease and cancer. Eating
6 fruits and vegetables also has the potential to reduce the risk
7 of obesity and many other chronic diseases including stroke and
8 diabetes.

9 78. California adults consume, on average, fewer than four
10 daily servings of fruits and vegetables, well below the five to
11 nine daily servings recommended for good health. As a result,
12 efforts to encourage people to eat more fruits and vegetables are
13 important to the future of the state and to the country.

14 79. Any increase in demand for California table grapes
15 benefits California table grape grower/shippers and the State of
16 California generally.

17 80. The domestic marketing program is implemented by a
18 staff of 4 people, which includes Cindy Plummer, Jane Lytle,
19 Karen Hearn, and Brad Brownsey (a consultant).

20 81. The domestic marketing program conducts domestic trade
21 management as well as research and education and outreach.

22 82. The purpose of the program is to increase the movement
23 of fresh California grapes from field to market or professional
24 kitchen. The program targets (1) retailers and wholesalers of
25 fresh grapes and (2) foodservice entities.

26 83. The Commission works with retailers and wholesalers to

1 increase the quantity of California table grapes sold during a
2 season, the square feet of display space that will be allocated
3 to California table grapes, the number of varieties displayed,
4 the effectiveness of the displays, and the number and
5 effectiveness of table grape advertisements run by retailers.

6 84. Among other things, the Commission works to "educate
7 and instruct the . . . retail trade with respect to proper
8 methods of handling and selling fresh grapes," as contemplated by
9 the California Legislature.

10 85. The portion of the Commission's trade management
11 program directed toward domestic retailers can be divided into
12 the following subcategories: (a) category management; (b)
13 promotional agreements; (c) tagged advertising, and (d) training.

14 86. Conducting category management research is one way the
15 Commission seeks to encourage retail grocery stores to sell a
16 greater volume of table grapes. Category management involves
17 the development of a comprehensive strategy for expanding sales
18 of a category of product, in this case California table grapes.
19 Category management research—on which the Commission spent nearly
20 a quarter of a million dollars in both 2004 and 2005—allows the
21 Commission to provide retailers information about the value of
22 selling fresh California grapes and the tactics that research has
23 indicated increase sales of fresh grapes.

24 a. To conduct some of this research, the Commission
25 contracts with a company called The Perishables Group, one of the
26 country's top retail produce category management research firm.

1 b. The results of the Commission's category management
2 research are then conveyed to the top 75 retailers (which
3 together constitute approximately 80% of the market) in
4 the United States and Canada. Commission staff meet with
5 representatives from retailers at least twice during the growing
6 season. Additionally, every year retailers are provided the
7 Commission's marketing materials, which summarize the
8 Commission's category management findings.

9 c. The Commission also conducts consumer research. For
10 this work, the Commission contracts with Fleishman-Hillard, a
11 national public relations and advertising firm.

12 d. In addition to the general category and consumer
13 research data provided to retailers, the Commission also shares
14 with retailers data related to that retailer's performance in
15 the grape category. This information is provided to encourage
16 retailers to increase grape ad activity.

17 87. Every year the Commission enters into promotional
18 agreements with retailers and wholesalers.

19 a. Retailers that earn an award are required to spend
20 the award through a third party. For example, retailers
21 frequently use their promotion award funds to have the
22 Commission book flights and hotel rooms for their employees
23 attending the annual Produce Marketing Association ("PMA") Fresh
24 Summit Conference.

25 b. Under the promotion agreement, retailers also agree
26 to share with the Commission information about their grape sales

1 and advertising. This allows the Commission to evaluate
2 effectiveness of the efforts overall and to ensure that the
3 retailers have met all of their commitments.

4 88. The domestic marketing program offers retailers tagged
5 advertising to encourage them to run more advertisements for
6 grapes.

7 a. The three retailers with the highest volume of
8 grape sales in a market are given the opportunity to have their
9 store name featured in the billboard and radio ads if it agrees
10 to conduct a certain level of advertising (running more grape
11 ads, increasing size of grape ads) for grapes in the upcoming
12 year. Retailers also must use California logos showing the
13 California origin of the grapes they sell.

14 b. The retailer's logo, for example, might be placed
15 on Commission billboard advertisements in the proximity of the
16 retailer's stores. Similarly, the names of retailers can be used
17 in the Commission's radio advertisements.

18 89. Because consumers prefer table grapes that are in good
19 condition, the Commission also provides training or training
20 materials to targeted retailers in the proper procedures for
21 handling, storing, and displaying table grapes.

22 a. Each year the Commission makes available to
23 retailers (via its website, on CDROMs, and in its Marketing
24 Training Guide) materials providing information about
25 grape displays, storage temperatures, backroom handling, and
26 grape delivery.

1 b. Because there is constant turnover in produce
2 departments, the Commission believes it must continually reach
3 out to retailers.

4 c. In addition to providing training materials, the
5 Commission also encourages retailers to put the Commission's
6 advice to use by creating attractive grape displays for entry
7 in the Commission's seasonal display contests. It is the
8 Commission's goal to encourage retailers to use the techniques
9 learned during the display contests throughout the California
10 grape season.

11 90. The Commission devotes significant efforts to encourage
12 foodservice providers to increase the amount of fresh grapes they
13 use.

14 a. Because people today eat out in restaurants more
15 frequently than ever before, the Commission's work targeting food
16 service providers is thought to be important.

17 b. One way the Commission attempts to increase the
18 volume of grapes used by foodservice providers is by working with
19 menu developers. In order to encourage menu developers to use
20 fresh grapes, the Commission has developed numerous recipes
21 featuring fresh grapes that it sends to foodservice providers.

22 c. Commission representatives also meet with menu
23 developers as frequently as possible. For example, in 2005, a
24 Commission representative attended a leadership retreat for menu
25 developers at the Culinary Institute of America in Napa.

26 d. In addition to developing and distributing recipes

1 featuring grapes and contacting menu developers, the Commission
2 contacts editors and writers for foodservice publications. For
3 example, every year a Commission representative attends an
4 international foodservice editors' council in order to meet with
5 editors and tell them about the many uses of grapes in recipes.

6 e. In aid of its efforts to increase the use of grapes
7 by foodservice providers, the Commission has retained a
8 registered dietician as a consultant. The registered dietician
9 is able to answer nutrition questions from the foodservice
10 industry as well as to help create information useful in
11 foodservice education efforts.

12 f. The Commission uses the research it has funded on
13 the health benefits of grapes in its efforts to expand their
14 usage by foodservice providers.

15 91. In 2004-2005, the Commission's domestic marketing
16 program spent \$ 1,445,242 in assessment dollars on the following
17 categories of activities: \$1,066,748 trade management,
18 \$328,554 research, and \$49,940 education and outreach.

19 92. Just four years ago, the Commission conducted little
20 category management research, but now the Commission has
21 developed a category management research program. In recognition
22 of the Commission's new category management research efforts, the
23 Commission recently won the "Category Captain" award for random
24 weight produce from Progressive Grocer magazine.

25 93. In 2004, the Commission had incentive agreements in
26 place with the retailers whose stores sell approximately 81.2% of

1 the table grapes sold in the United States and Canada. Each
2 year the Commission provides rewards to retailers under these
3 contracts totaling approximately \$450,000 to \$500,000.

4 94. Retailers participating in the Commission's September
5 2005 display contest reported average increases of grape sales of
6 217% over normal sales for that time period. Research shows that
7 just over 50% of the (1251) table grape purchasers surveyed
8 decide to buy grapes once they are in the store and just over 60%
9 of those who decide in the store to buy grapes do so
10 because the grapes look good.

11 95. The Commission undertakes an extensive amount of
12 consumer preference research.

13 96. McDonald's decided in May 2005 to start selling the new
14 Fruit and Walnut Premium Salad, which features fresh grapes. The
15 appearance of fresh grapes on the McDonald's menu followed more
16 than two years of work by the Commission with McDonald's menu
17 developers. McDonald's indicated that it planned to buy 6.5
18 million pounds of fresh grapes in 2005, but McDonald's has not
19 made public the amount of California table grapes that actually
20 were purchased that year.

21 97. A 1993 consumer survey indicated that 82% of responding
22 primary grocery shoppers agreed that "grapes are a healthy,
23 nutritious snack." A 2005 consumer survey indicated that 99% of
24 U.S. and Canadian shoppers surveyed believe fresh grapes are
25 "extremely good/good for you."

26 98. The primary activities of the Commission's

1 international marketing program can be broken down into three
2 areas: (1) market access (which falls within the issue management
3 category), (2) international trade management, and (3)
4 international research.

5 a. The market access work undertaken involves efforts
6 to increase access by California grapes to foreign export markets
7 by opening markets, keeping them open, and reducing tariffs.

8 b. The international marketing program also includes
9 market research on a range of subjects including consumer and
10 trade attitudes, export protocols, and foreign production.

11 99. In 2004-2005, the Commission's international marketing
12 program spent a total of \$4,666,522. Of that amount, \$1,288,853
13 came from assessments and was spent on the following categories
14 of activities: \$121,176 for education and outreach, \$170,114 for
15 research, \$238,847 for issue management, and \$758,717 for trade
16 management.

17 100. The market access work undertaken by the international
18 marketing program is principally financed with assessment
19 dollars.

20 101. The Commission received \$2,958,649 in MAP funds for
21 2004; to date for the 2005 fiscal year the figure is \$2,501,538,
22 as not all MAP funding has been received.

23 102. In order to obtain these funds, the Commission must
24 agree to match a certain percentage of the MAP funds with its own
25 funds. For 2005, the Commission agreed to match 79% of the
26 MAP funds with its own spending.

1 103. USDA data indicate that between 1995 and 2004 the
2 volume of fresh grape exports has increased 63% and the value of
3 those exports has increased 78%.

4 104. In addressing market access issues, the Commission
5 works closely with USDA and the Office of the U.S. Trade
6 Representative ("USTR") in attempts to enhance the position of
7 the table industry in negotiations between the United States and
8 other governments. The Commission also retains a consultant,
9 Bryant-Christie, Inc., that specializes in market access issues.

10 105. Market access work is divided into three primary
11 areas: opening markets, keeping markets open, and providing
12 broader access through the elimination of tariff and nontariff
13 trade barriers.

14 106. First, the Commission works with USDA and USTR to
15 attempt to open new markets to fresh California grapes. For
16 example:

17 a. In order to open the Australia market to California
18 grapes, the Commission expended significant efforts from 1990 to
19 2002 conducting research and working with the USDA and the USTR
20 to negotiate a shipping protocol that called for grapes to be
21 fumigated with methyl bromide. It also expends significant
22 efforts helping to administer the shipping protocol put in place.

23 i. In order to facilitate compliance with the
24 protocol and to fund operations under the protocol, the
25 Commission created the California Table Grape Export Association.
26 The Association works directly with shippers and Australian

1 government officials to manage and coordinate inspections by the
2 Australian officials of California table grapes being shipped to
3 Australia.

4 ii. Each year, the Australian government also
5 requires a list of all those entities that will be shipping to
6 the Australian market, including their designated contact person,
7 and their fumigation facility locations and operators. The
8 Commission compiles this list for the USDA so that it can provide
9 the information to its Australian counterparts.

10 b. The Commission also worked with USDA and the USTR
11 to re-open the New Zealand market when its government closed the
12 market to fresh California table grapes in 2001 because of fears
13 that black widow spiders would enter New Zealand and threaten its
14 consumers.

15 i. To help to resolve the problem, the Commission
16 briefed California shippers exporting to New Zealand on how to
17 improve their handling and shipping of table grapes to eliminate
18 the presence of black widow spiders. The improvements in
19 handling and shipping resulted from Commission sponsored studies
20 of table grape box types and the use of carbon dioxide ("CO₂")
21 and sulfur dioxide ("SO₂") to kill any black widow spiders that
22 made their way into a shipment. Ultimately, the Commission,
23 USDA, and the USTR were able to convince the New Zealand
24 government that a shipment protocol involving appropriate box
25 types and treatment was adequate protection.

26 ii. The Commission worked with county

1 agricultural inspectors in California and USDA to develop the
2 protocol and assure the New Zealand government that it was being
3 used uniformly. Through this effort, the New Zealand market was
4 re-opened before the end of the 2002 California marketing period.

5 c. The Commission also worked closely with USDA Animal
6 and Plant Health Inspection Service to convince the New Zealand
7 government that cold treatment was unnecessary to prevent the
8 introduction of glassy winged sharpshooters in California
9 grape shipments. New Zealand repealed its cold storage
10 requirement in 2005.

11 d. The Commission also worked with USDA and the USTR
12 to open the India market to California table grapes in 2001.
13 India had long been closed to imports or had extremely high
14 tariffs or complex import permit requirements that sharply
15 limited volumes. The Commission began working with USDA, the
16 Indian government, and the Indian table grape industry
17 approximately four years in advance of the opening of the market.
18 A Commission representative was sent to India twice to pave the
19 way for opening the market. When India started to liberalize its
20 market to world trade in April 2001, the Commission immediately
21 worked with the U.S. and Indian governments to help gain access
22 and California table grape shipments were sent to India in that
23 first season following the liberalization.

24 e. The Commission also helped to open the China market
25 to lawful imports of California table grapes in 1997 following
26 years of negotiation between the US and Chinese governments. The

1 US government worked to open the market at the urging of, and in
2 conjunction with, the Commission. The Commission's role in
3 opening the market was two-fold: keeping the US government
4 focused on getting the market open; and participating with the US
5 government in the development of a work plan that outlined the
6 rules under which the fruit could be shipped between the two
7 countries.

8 i. The agreement was negotiated between and
9 signed by the governments of China and the United States, but
10 like most market access issues in which the Commission is
11 involved, the Commission played an important role in the
12 negotiations. The Commission had a representative from Bryant
13 Christie in attendance at most of the negotiation sessions,
14 including the final session.

15 ii. To this day, China continues to require a
16 list of approved shippers, and the Commission continues to be
17 responsible for developing that list and maintaining it. It is
18 submitted annually to USDA which in turn submits it to
19 the Chinese government. The Mediterranean fruit fly trapping
20 continues to be required, although in recent years the cost has
21 been borne by the counties.

22 f. The Commission is also working to facilitate
23 expanded shipments into China by California grower/shippers.

24 i. As noted above, China requires that all
25 shippers of California grapes into China be registered. The list
26 of registered shippers is given to Chinese customs officials at

1 all of the ports of entry. Any grapes from a shipper not on
2 the list are turned away. At the request of China and the USDA,
3 the Commission compiles and maintains the list. The list is
4 compiled after soliciting California grower/shippers to sign up.
5 After the list is compiled, it is given to USDA, which then gives
6 the list to the Chinese authorities.

7 ii. In addition to working under the China
8 protocol, the Commission is working to modify the protocol to
9 permit inspections to be made in the U.S. at the port of exit.
10 Under the current system, Chinese customs officials from time to
11 time turn away shipments of fruit from registered shippers based
12 on minor errors in the list or other mistakes.

13 iii. Additionally, the Commission is working with
14 the USDA and the USTR to eliminate the Mediterranean fruit fly
15 trapping program required by China and to open a new port in
16 China to shipments of California table grapes.

17 107. Second, the Commission works with USDA, the USTR,
18 foreign governments, and other interested parties to attempt to
19 keep foreign markets open to California grapes by responding
20 to incidents that arise that need a prompt resolution.

21 a. When exported California grapes are turned away by
22 foreign customs officials or other critical export problems
23 arise, the Commission responds by coordinating the efforts of the
24 U.S. government, U.S. embassy officials, foreign industry, and
25 foreign governments to attempt to resolve the problem.

26 b. Various impediments to exports periodically arise

1 requiring the Commission to work with others to attempt to avert
2 two types of potential losses: immediate loss to the shippers
3 whose fruit is sitting on a dock or at a border crossing awaiting
4 approval to move, and loss to the industry as a whole from the
5 closing of a market mid-season.

6 c. For example, a black widow spider was found in the
7 United Kingdom in 2002 and threatened to close that market to
8 California grapes. In 2004-2005, an European Union sulphur
9 dioxide requirement almost closed the member countries' markets
10 to California grapes. Mexico and Panama briefly closed in 1999
11 due to misidentified pests. California grape shipments that had
12 already arrived in Australia were held up in 2003 due to missing
13 box stamps. Venezuelan shipments were disrupted due to the
14 Venezuelan government reducing the number of, and volumes within,
15 import permits they issue that allow fruit into that market.
16 Concern about Mediterranean fruit flies in Taiwan almost closed
17 that market to California grapes. The Commission responded
18 to each of these incidents by working with the relevant
19 governmental and private parties to keep the markets open.

20 108. Third, the Commission works with the USDA and the USTR
21 to attempt to lower tariff and non-tariff barriers that impede
22 the flow of California table grapes to foreign countries.

23 a. The Commission tracks international standards for
24 grapes—including packaging standards, maturity/quality standards,
25 and especially pesticide maximum residue levels ("MRLs")—and
26 works with USDA, the USTR, foreign governments, and international

1 bodies to ensure that these standards are reasonable and based on
2 an informed judgment about the costs and benefits of setting
3 standards at various levels.

4 i. The Commission works with the Codex
5 Alimentarius Commission (which was created in 1963 by the United
6 Nations Food and Agriculture Organization and the World Health
7 Organization) in its efforts to set international standards for
8 grapes.

9 ii. The Commission works with USDA, the USTR, and
10 other countries that import grapes to attempt to implement
11 workable MRL standards in countries that import grapes and to
12 develop reasonable packaging and labeling standards.

13 b. The Commission expends significant efforts working
14 with USDA and the USTR to attempt to lower tariffs imposed by
15 foreign countries.

16 i. The Commission has worked with the Bryant-
17 Christie firm to attempt to lower tariffs on California grapes
18 since 2004.

19 ii. The Commission has conducted a review of the
20 tariffs applicable to California table grapes in numerous foreign
21 countries and has outlined not only the tariffs that California
22 grower/shippers must pay but also the tariffs that their
23 competitors must pay.

24 iii. For the California table grape industry, the
25 effort to reduce tariffs involves meeting with the USTR, the
26 federal government agency responsible for the United States'

1 participation in the WTO negotiations, and urging the agency
2 to attempt to secure the lowest possible tariffs for California
3 grapes. The issue of lowering tariffs comes up frequently, both
4 in the context of the WTO negotiations and regional negotiations,
5 such as the Central America Free Trade Agreement. In these
6 negotiations, it is important to keep the importance of lower
7 tariffs for California table grapes in the negotiators' minds,
8 and provide data in support of these requests. This can make the
9 difference between having a reduced tariff take effect
10 immediately versus having a high tariff maintained or phased out
11 over an extended period, such as 12 years.

12 iv. By working to keep the issue of tariffs
13 before the USTR, the Commission has helped to obtain tariff
14 reductions for California table grapes in markets such as the
15 Central America Free Trade Agreement countries and the Dominican
16 Republic.

17 109. The Commission's international trade management
18 activities, which are funded principally with MAP funds, target
19 the trade: retailers, importers, and wholesalers. The goal of the
20 program is to encourage retailers, importers, and wholesalers to
21 buy more California grapes more often and during more of the
22 California season (May-January).

23 110. The core of the Commission's international trade
24 management effort is the work of its 15 overseas representatives
25 who work directly with overseas retailers, importers, and
26 wholesalers. They provide grape storage, handling, and display

1 information to retail stores.

2 111. The representatives also monitor local markets in
3 their countries or regions and provide information that is
4 conveyed in "Global Market Reports" that are sent twice a month
5 during the California season to California table grape grower/
6 shippers to help them, if they are interested, understand the
7 dynamics at work in foreign markets.

8 112. A portion of the Commission's international trade
9 management consists of "joint promotions" with retailers. These
10 joint promotions include activities such as in-store
11 demonstrations where the Commission employs people to provide
12 information and grape tastings to consumers, competitions for
13 consumers to enter at the point of sale of table grapes, cooking
14 demonstrations at the point of sale, special displays including
15 secondary display locations and center aisle locations, point of
16 sale posters, banners and the like.

17 113. The Commission also provides financial awards to
18 retailers for certain grape promotional activities, like offering
19 samples or otherwise featuring California grapes.

20 114. In support of its market access and international
21 trade management efforts, the Commission conducts research on
22 various international topics.

23 a. A portion of that research work consists of foreign
24 production studies designed to provide California grower/
25 shippers, if they are interested, with specific information about
26 competitive countries. The Commission has recently conducted

1 production studies of a number of countries, including China,
2 Peru, and Spain. The studies examine grape production in foreign
3 countries, and in China's case also the development of the
4 infrastructure for the postharvest management and transportation
5 of fresh grapes.

6 b. The Commission has also funded two transshipment
7 studies. One tracked grapes that were exported to Malaysia but
8 then transported across the border into Thailand. The other
9 tracked grapes that traveled from China to Vietnam across their
10 shared land border.

11 115. Exports of California table grapes have increased over
12 the past decade.

13 a. According to USDA data, total exports of California
14 table grapes to offshore markets and Mexico increased from
15 122,451 metric tons in 1995 to 201,653 metric tons in 2004. The
16 total volume of California table grapes exported over the past
17 five years is higher than the previous five years.

18 b. Over the past five years (2000 versus 2004),
19 exports to some of the industry's largest exports markets have
20 increased. For instance, exports to Malaysia have increased 98%
21 (+11,510 metric tons), exports to the United Kingdom have
22 increased 30% (+3,396 metric tons), and exports to Indonesia have
23 increased 152% (+6,694 metric tons).

24 116. Studies indicate that 94% of consumers surveyed in
25 select markets in certain Central American countries are aware of
26 U.S./California grapes, 78% of consumers surveyed in select

1 markets in China are aware of U.S./California grapes, 97% of
2 consumers surveyed in select markets in Hong Kong are aware of
3 U.S./California grapes, 57% of consumers surveyed in select
4 markets in Japan are aware of U.S./California grapes, 85% of
5 consumers surveyed in select markets in Indonesia are aware of
6 U.S./California grapes, 65% of consumers surveyed in select
7 markets in Malaysia are aware of U.S./California grapes, 87%
8 of consumers surveyed in select markets in the Philippines are
9 aware of U.S./California grapes, 65% of consumers surveyed in
10 select markets in Singapore are aware of U.S./California grapes,
11 and 95% of consumers surveyed in select markets in Taiwan are
12 aware of U.S./California grapes. Research has also shown that
13 awareness of U.S./California as an origin for grapes in most
14 export markets significantly increases the likelihood of trial
15 by the consumer.

16 117. To receive MAP and EMP funds, a party must provide a
17 certain level of matching funds, which the Commission is able to
18 do.

19 118. The Commission has been able to increase the amount of
20 federal funds it receives while its contribution has remained
21 fairly stable. While federal funds allocated to the Commission
22 increased 69% in the five years between 2000 and 2004, the
23 Commission's contributions have increased only 20%.

24 119. The Commission has had success working with USDA and
25 the USTR to open new markets to California table grapes. For
26 example, since 1997, the Commission has been actively involved in

1 efforts with USDA and the USTR to open China, India, and
2 Australia. It also worked with USDA and the USTR to re-open the
3 New Zealand market.

4 120. The Commission works with USDA, the USTR, foreign
5 governments, and interested parties to keep existing markets open
6 to California grapes.

7 a. For example, the Commission's work with the U.K.
8 government and U.K. retailers helped to keep the United Kingdom
9 market open when U.K. retailers indicated they intended to stop
10 importing California grapes in 2002 following the discovery of a
11 black widow spider in a shipment of California table grapes.

12 i. The U.K. is one of the California table grape
13 industry's largest export markets.

14 ii. The black widow discovery was noted in the
15 press in London, and retailers indicated that they intended to
16 stop buying California grapes. A few retailers continued to sell
17 the product they had on their shelves and a few accepted loads of
18 fruit that were already on the water but most did not. More
19 important, major retailers indicated that California grapes would
20 not be imported in the 2003 season.

21 iii. In response to the incident, the Commission
22 President traveled to the U.K. in early January of 2003 to meet
23 with retailers and importers. To address retailers concerns, the
24 Commission put together a voluntary protocol for shipping to the
25 U.K. that is designed to eliminate black widow spiders.

26 iv. The shipping protocol, which remains in

1 existence, requires shippers to register with the Commission in
2 order to ship to the U.K. and agree to take certain steps pre-
3 harvest to eliminate black widow spiders in the field and to
4 submit to post-harvest fumigations and inspections. Shippers
5 agree to have their names provided to buyers in the U.K. so that
6 buyers know which shippers have agreed to abide by the shipping
7 protocol.

8 v. As a result of the protocol, shipments to the
9 United Kingdom resumed in 2003 and have been uninterrupted. The
10 U.K. remains one of the industry's top markets. There have been
11 no more reported spider finds.

12 b. In 2004, when different Member State
13 interpretations of a European Union directive 95/2/EC were
14 creating uncertainty about the tolerance level for sulfur dioxide
15 on table grapes, the Commission, Bryant Christie, the USDA, and
16 Freshfel (a European fresh produce importers association) entered
17 into consultations with the European Commission to clarify the
18 issue and press for a definitive SO₂ tolerance of 10 ppm on fresh
19 grapes. This has led to a process currently underway to amend
20 the E.U. legislation to clearly establish a 10 ppm SO₂ tolerance
21 on fresh grapes. Approval of the amendment is expected by spring
22 2006.

23 c. In late 2004, the Thai government suddenly released
24 a Ministerial announcement effectively banning three chemicals by
25 setting a zero tolerance on them, thereby preventing the
26 importation of California table grapes. The Commission worked

1 with various departments of the U.S. government, including the
2 U.S. Department of Agriculture Animal and Plant Health Inspection
3 Service, the Foreign Agricultural Service, and the U.S. Embassy
4 in Bangkok, Thailand to have the announcement reversed. The Thai
5 government postponed the start date for implementation of this
6 requirement, and the requirement has not yet been implemented.

7 d. The Commission tracks packaging, shipping, residue
8 levels, and phytosanitary requirements imposed by countries that
9 import California table grapes. It summarizes this data (along
10 with marketing information) by country in a database that is
11 accessible only to California table grape grower/shippers on a
12 password-protected portion of the Commission's web site,
13 www.freshcaliforniagrapes.com/en-US/Growers/
14 InternationalTrade.htm>. This information is not available
15 anywhere else.

16 121. The Commission's consumer education program is
17 intended to provide consumers with information about the health
18 and nutrition benefits of fresh California grapes and with
19 information about the industry, with the goal of keeping
20 California table grapes "top-of-mind" for consumers and educating
21 them about grapes and California's fresh grape industry.

22 122. For example, the Commission sends recipe ideas,
23 photography, and fresh California grape health information to
24 newspaper food editors.

25 123. The Commission also regularly contacts writers and
26 editors of consumer magazines to learn what would prompt them to

1 write stories about fresh grapes and then responds by providing
2 them with the latest research on grape phytonutrient,
3 photography, recipe ideas, and news about the industry.

4 a. For a current example, as a result of the
5 Commission's outreach efforts, the October 2005 issue of the
6 culinary magazine Gourmet contained a two-page story on grapes
7 and the October 2005 issue of the culinary magazine Bon Apatite
8 contained a four page article about cooking with table grapes and
9 published a number of recipes using grapes.

10 124. In 2004, the Commission contacted television stations
11 and cable broadcast networks and made available to them a
12 spokesperson (Food Network host, celebrity chef, and award-
13 winning cookbook author Kathleen Daelemans) hired by the
14 Commission to explain how fresh California grapes can be an
15 important part of a healthy diet. In response, 47 television
16 stations decided to air footage of Ms. Daelemans talking about
17 grapes. She also appeared by tape on the Health and Home Report,
18 a syndicated television show that airs on cable broadcast
19 networks.

20 125. The Commission produces educational brochures and
21 publications that detail the history of the industry, the health
22 benefits of eating fresh grapes, and usage ideas such as freezing
23 grapes for a cool summertime treat or adding them to salads for a
24 pleasing hint of sweetness, color, and a crisp texture. This
25 information is also included on the commission's website at
26 www.freshCaliforniagrapes.com.

1 126. The Commission sends materials to members of the
2 American Dietetic Association and meets with dietitians,
3 nutritionists, and family physicians, answering their questions
4 about the health benefits of fresh California grapes and
5 providing them with the information and resources the Commission
6 thinks they need to confidently recommend to their clients,
7 consumers, or patients that fresh California grapes should be a
8 part of their diet.

9 a. In 2005, the Commission went to the annual
10 convention of the American Academy of Family Physicians and spoke
11 with the doctors in attendance about the health benefits of fresh
12 California grapes. The Commission interviewed the doctors about
13 healthy eating, and those interviews were then used in a video
14 and an audio news release for television and radio stations about
15 healthy eating and the benefits of fresh California grapes as
16 part of a healthy diet.

17 127. Each year the Commission sends out news releases
18 announcing the start of the California table grape season and
19 conducts outreach on television (e.g., sending grapes to
20 television newscasters and conducting live interviews) to tell
21 people that they are now able to purchase California grapes.

22 128. In 2004-2005, the Commission's consumer education
23 program spent \$694,229 in assessment dollars on the following
24 categories of activities: \$56,084 on research and \$638,145 on
25 education and outreach.

26 129. The Commission provides information about California

1 table grapes to newspapers to encourage them to run stories about
2 California grapes. The firm that tracks news coverage for the
3 Commission (Burrelle's Information Services) found that in 2004 a
4 significant number of stories about fresh grapes and the
5 California industry were based on this information.

6 130. The Commission also provides information about
7 California grapes to magazine writers and editors. The consumer
8 research and public relations firm Fleishman-Hillard found that
9 in 2004, more than 90 articles based on this information appeared
10 in major consumer magazines like Better Homes and Gardens, Bon
11 Appetit, Family Circle, Good Housekeeping, Martha Stewart Living,
12 and Woman's Day.

13 131. In addition to the Commission activities that fall
14 generally within one of the five principal Commission programs, a
15 number of Commission issue management activities fall outside of
16 the established programs. One such activity is the Commission's
17 phytonutrient research program. Another is its work with
18 foundations that work to educate consumers about the value of a
19 good diet.

20 132. The Commission's phytonutrient research program funds
21 research into the potential health benefits of table grapes.

22 133. In 1997, a researcher from the University of Illinois,
23 Chicago, published a study that found that a substance called
24 resveratrol fought cancer at three different stages of its
25 growth. The predominant dietary source of resveratrol is grapes.

26 134. The Commission, after speaking with the researcher,

1 Dr. John Pezzuto, held a symposium on grape phytonutrient among
2 researchers exploring the human health potential of grape
3 compounds and then created a scientific advisory panel, chaired
4 by Dr. Pezzuto, to advance the science linking fresh grapes with
5 the prevention of disease and improved human health.

6 a. The panel consists of Dr. Pezzuto, currently Dean
7 of the College of Pharmacy, Nursing and Health Sciences at Purdue
8 University, Dr. Richard Moon with the University of Illinois,
9 Chicago, Dr. Le Creasy of Cornell University, Dr. Richard Van
10 Breemen with the University of Illinois, Chicago, Dr. Myron Gross
11 with the University of Minnesota, and one member of the
12 Commission board, Fred Smeds.

13 135. One of the foundations of the Commission's research is
14 a standardized preparation of fresh California grapes used for
15 the research, which the Commission developed.

16 a. The grapes are collected from throughout
17 California's growing region during the growing season which runs
18 from May through December. The grapes are frozen, blended, and
19 freeze-dried in a proprietary process that ensures that the
20 compound contains all of the biologically active compounds found
21 in fresh California grapes.

22 136. Since 1998, the Commission has funded or supported 29
23 research studies.

24 137. As research studies are completed and published and
25 new information about the impact of grape consumption on human
26 health is generated, this information is disseminated to the

1 media and others, such as dieticians, nutritionists, and family
2 physicians.

3 138. In 2004-2005, the Commission spent approximately
4 \$270,000 on its phytonutrient research efforts.

5 139. The Commission has been and continues to be involved
6 in the efforts to address obesity and improve the health of
7 consumers by working with various foundations that educate
8 consumers about the value of a good diet.

9 a. The Commission assisted in the creation of and
10 works with the California and national 5-A-Day programs, in
11 conjunction with the California Department of Health Services,
12 the National Cancer Institute, and the Center for Disease
13 Control. These efforts encourage all Americans to eat five or
14 more servings of fruits and vegetables each day in order to
15 prevent obesity and other disease. The Commission was a founding
16 partner of both organizations and remains actively involved.

17 b. The Commission's Vice President serves on a
18 committee of the Produce for Better Health Foundation ("PBH") and
19 sits on the board of Spoons Across America, two organizations
20 that are actively involved in improving the quality of Americans'
21 diet. PBH educates consumers about the importance of eating more
22 fruits and vegetables, and Spoons Across American teaches
23 children about good nutrition and provides them with the basic
24 cooking skills they need to have control over their own diet.

25 c. The Commission's Vice President of Domestic
26 Marketing serves on the PBH board and Marketing Committee and as

1 the co-chair of the Joint Steering Committee for the California
2 Nutrition Network and California 5 A Day program.

3 140. The Commission's efforts to develop a standardized
4 freeze-dried mixture of California grapes that can be used in
5 research projects have helped improve research on the health
6 benefits of grapes.

7 141. Researchers funded by the Commission have found links
8 between the compounds in fresh California grapes and fighting or
9 preventing diseases such as cancer, heart disease, and
10 degenerative nerve damage.

11 142. The Commission's health research program and the work
12 of its Scientific Advisory Panel has been helpful in generating
13 research and awareness of the health potential for fresh grapes
14 and fresh grape compounds in the scientific community. For
15 example, there are researchers exploring potential links between
16 grapes and prevention of certain viruses as well as prevention of
17 Alzheimer's disease.

18 143. Consumer research by the Commission has shown that the
19 existence of a health claim that eating grapes is beneficial to
20 one's health would motivate some primary grocery shoppers to
21 purchase and consume more fresh California grapes more often.

22 144. Research by the Commission has shown that awareness of
23 the health benefits of fresh California grapes can be a
24 motivating purchase factor for a majority of primary grocery
25 shoppers even without the health claim.

26 145. The Commission's support of the California and

1 national 5 A Day programs and the Produce for Better Health
2 Foundation, in conjunction with the efforts of other groups, has
3 been important in those programs in encouraging Californians and
4 Americans to eat more fruits and vegetables and thereby improve
5 their health.

6 146. If an individual promotion program would be profitable
7 without a generic promotion program, it would also be profitable
8 with a generic promotion program.

9 147. The process of obtaining the federal funds used by the
10 Commission is complex and cumbersome, but the Commission is
11 willing and able to dedicate the resources necessary to
12 obtain the funding.

13 148. The Commission is able to provide the matching funds
14 required to obtain federal export grant money.

15 149. Individual grape grower/shippers do not have the
16 incentive to conduct the consumer education activities undertaken
17 by the Commission.

18 150. The Plaintiffs conduct no significant direct
19 advertising to consumers.

20 a. When Plaintiffs Susan Neill Company and Lucas
21 Brothers Partnership grew and shipped California table grapes,
22 they advertised only in trade publications, and that
23 advertising (which was for Lucas Brothers grapes) was relatively
24 limited.

25 b. Virtually all of Plaintiff Delano Farms'
26 advertising is in trade publications.

1 151. The Susan Neill Company and Lucas Brothers Partnership
2 no longer grow or ship California table grapes and therefore no
3 longer pay assessments to the Commission.

4 152. Susan Neill Company has never itself borne the cost of
5 the assessments paid on grapes it has shipped. Susan Neill
6 Company has always passed the cost of the assessment on to Lucas
7 Brothers Partnership.

8 153. The Commission was created by the California
9 Legislature, and the Legislature has defined its duties.

10 154. The CDFA oversees and conducts voting on five-year and
11 special termination referenda under the Ketchum Act.

12 155. The CDFA oversees the nomination and selection of
13 producers eligible to be appointed to the Commission board by the
14 Secretary.

15 156. All of the Commissioners of the Commission are
16 appointed and subject to removal by the Secretary.

17 a. Growers hold nominating meetings followed by
18 elections to determine who they will recommend to the Secretary
19 for appointment.

20 b. The Secretary then determines who to appoint to the
21 Commission and appoints that person.

22 c. Prior to appointment, the CDFA inquires into
23 whether potential commissioners are suitable for appointment.

24 d. The Secretary is authorized to remove a
25 commissioner if necessary.

26 157. The Commission, like other mandated commodity

1 organizations overseen by the CDFA, pays its share of the common
2 expenses incurred by the marketing branch of the CDFA.

3 158. California table grape growers have filed grievances
4 with the Commission, as permitted under the Ketchum Act, on at
5 least four occasions in the past.

6 159. When a grievance is filed, the grower is given an
7 opportunity to present his position to the Commission and then
8 the Commission renders a decision, which can be appealed to the
9 CDFA.

10 160. In 2004, a grower appealed the Commission's denial of
11 his request for disclosure of the salary of the Commission
12 President under the Public Records Act. After receiving the
13 appeal, the Secretary asked the Commission to submit the video
14 tape of the hearing at which the grievance was presented and to
15 explain the rationale behind its decision. After considering the
16 Commission's submission, the Secretary rendered a decision
17 reversing the Commission's determination and ordered disclosure
18 of the salary. The Secretary held that the Commission "is a
19 government entity within the meaning of the Public Records Act."
20 The Commission then disclosed the requested information as
21 ordered.

22 161. The CDFA has indicated that if a person complained to
23 the CDFA about a Commission advertisement, the CDFA would review
24 the matter internally and could act to block the ad or advise
25 that it be changed.

26 162. Each month the Commission receives the CDFA's

1 Marketing Memo, which contains information and instructions for
2 marketing orders, agreements, councils, and commissions.

3 163. The CDFA has provided guidance to the Commission
4 regarding the level of reserves it maintains.

5 164. The CDFA can, if it wants, request that the Commission
6 provide it with information, including notices of meetings,
7 meeting minutes, contracts, and copies of advertisements.

8 165. The Commission responds to any requests for
9 information from CDFA marketing branch staff.

10 166. The CDFA conducts audits of grape shippers on behalf
11 of the Commission.

12 167. The Commission complies with certain legal
13 requirements imposed on some state agencies.

14 a. All of the Commission's meetings are conducted in
15 accordance with the Bagley- Keene Open Meeting Act, as directed
16 by the CDFA. Accordingly, the Commission gives notice of all of
17 its meetings and its meetings are generally open to the public.

18 b. The Commission is required to comply with the
19 Public Records Act.

20 c. The Commission is required to and does submit a
21 Statement of Facts Roster of Public Agencies Filing to the
22 California Department of State every year.

23 d. The Commission's Commissioners are required each
24 year to submit disclosure statements to the Fair Political
25 Practices Commission every year.

26 168. Commission employees are eligible to participate in

1 the state's Savings Plus Program, a retirement saving program for
2 state employees, but are not required to.

3 169. The CDFA provides Commission employees with a template
4 for creating identification cards that allow them to take
5 advantage of special rates for state employees, but said
6 employees are not required to do so.

7 170. Commission employees may, and are encouraged by the
8 CDFA to, use State of California employee travel discounts.

9 E. STANDING OF THE SUSAN NEILL COMPANY AND LUCAS BROTHERS
10 PARTNERSHIP.

11 A footnote to the Commission's opening memorandum supporting
12 its motion for summary judgment argues that Plaintiffs The Susan
13 Neill Company and Lucas Brothers Partnership lack standing to
14 seek any prospective relief because they stipulated that these
15 plaintiffs "no longer grow or ship California table grapes and
16 therefore no longer pay assessments to the Commission."

17 Plaintiffs respond that this stipulated fact is "irrelevant
18 to the extent that these two Plaintiffs are seeking refunds of
19 past paid assessments." This is a concession that The Susan
20 Neill Company and Lucas Brothers Partnership no longer have
21 standing to obtain prospective relief.

22 The Commission also cites to the stipulated fact that the
23 "Susan Neill Company has never itself borne the cost of the
24 assessments paid on grapes it has shipped [and that] Susan Neill
25 Company has always passed the cost of the assessment on to Lucas
Brothers Partnership". Plaintiffs respond by an objection on the

1 ground of relevance. In a footnote to their opposition brief to
2 the Commission's motion for summary judgment, Plaintiffs object
3 to the contention that the Susan Neill Company has no standing:
4 "First of all Susan Neill is married to George Lucas, general
5 partner of Lucas Bros. partnership. Secondly, the Susan Neill
6 Company does have standing since the [Act] does require the
7 shipper (Susan Neill) to actually pay the assessments to the
8 Commission, regardless of whether she passes that on to Lucas
9 Bros."

10 As the Commission correctly responds, Plaintiffs'
11 contentions do not establish standing for The Susan Neill
12 Company:

13 Whether Ms. Neill is married to Mr. Lucas ...
14 says nothing about whether The Susan Neill
15 Company can recover assessments for which it
16 was reimbursed and seek declaratory and
17 injunctive relief with respect to a law that
18 no longer affects it. Moreover, because The
19 Susan Neill Company seeks only a refund of
past assessments, not recovery of any
administrative costs it might have incurred
in paying assessments on behalf of Lucas
Bros. Partnership ..., that fact that it
'actually pa[id] the assessments' before
getting reimbursed is irrelevant.

20 The Commission's motion for partial summary judgment on the
21 grounds that The Susan Neill Company lacks standing to obtain
22 relief as that entity never paid assessments and that the Lucas
23 Brothers Partnership lacks standing to obtain prospective as
24 opposed to past relief is GRANTED and Plaintiffs' motion for
25 summary judgment on this issue is DENIED.

26 F. GOVERNMENT SPEECH.

1 The parties respectively move for summary judgment that the
2 Commission's program is or is not "government speech," subject or
3 not subject to First Amendment protections.

4 Relying on the Supreme Court's opinion in *Johanns v.*
5 *Livestock Marketing Ass'n.*, 544 U.S. 550 (2005), Plaintiffs argue
6 that the Act's provisions and the California Department of Food
7 and Agriculture's involvement "in the Commission's speech, let
8 alone [the Commission's] activities, [are] not even arguably in
9 the same ball park compared to the control over the make-up and
10 communications of the Beef Board." Plaintiffs argue the
11 Commission's program is not "government speech" as that term is
12 defined in *Johanns* and summary adjudication in their favor on
13 this issue is appropriate.

14 The Commission rejoins that the Commission's speech is
15 "government speech" for three reasons: "(1) the messages
16 Plaintiffs challenge were mandated by the California Legislature;
17 (2) the Commission itself is a governmental entity; and (3) the
18 CDFA retains effective control over the Commission's speech
19 because it appoints and can remove Commission board members and
20 is empowered to reverse any improper actions taken by the
21 Commission."

22 1. *Johanns v. Livestock Marketing Ass'n.*

23 In *Johanns v. Livestock Marketing Ass'n.*, the Supreme Court
24 addressed "whether the generic advertising at issue is the
25 Government's own speech and therefore is exempt from First
26 Amendment scrutiny." 544 U.S. at 553. The Beef Promotion and

1 Research Act of 1985, 7 U.S.C. § 2901(b), announces a federal
2 policy of promoting the marketing and consumption of "beef and
3 beef products." The statute directs the Secretary of Agriculture
4 to implement this policy by issuing a Beef Promotion and Research
5 Order (Beef Order or Order) and specifies four key terms the Beef
6 Order must contain: (1) The Secretary is to appoint a Cattlemen's
7 Beef Promotion and Research Board (Beef Board or Board), whose
8 members are to be a geographically representative group of beef
9 producers and importers, nominated by trade associations; (2) the
10 Beef Board is to convene an Operating Committee, composed of 10
11 Beef Board members and 10 representatives named by a federation
12 of state beef councils; (3) the Secretary is to impose a \$1-per-
13 head assessment or checkoff on all sales or importation of cattle
14 and a comparable assessment on imported beef products; and (4)
15 the assessment is to be used to fund beef-related projects,
16 including promotional campaigns, designed by the Operating
17 Committee and approved by the Secretary.

18 The Secretary promulgated the Beef Order with the specified
19 terms. The assessment is collected primarily by state beef
20 councils, which then forward the proceeds to the Beef Board. The
21 Operating Committee proposes projects to be funded by the
22 checkoff, including promotion and research. The Secretary or his
23 designee approves each project and, in the case of promotional
24 materials, the content of each communication. Respondents sued
25 the Secretary in federal court, arguing based on *United Foods*
26 that the advertising promotes beef as a generic commodity which

1 impedes their efforts to promote the superiority of American
2 beef, grain-feed beef, or certified Angus or Hereford beef. *Id.*
3 at 554-555. After a bench trial, the district court ruled for
4 respondents, declaring that the Beef Act and Beef Order
5 unconstitutionally compel respondents to subsidize speech to
6 which they object, and rejected the Government's contention that
7 the checkoff survives First Amendment scrutiny because it funds
8 only government speech. *Id.*, at 556.

9 The Eighth Circuit affirmed the district court, although the
10 Eighth Circuit did not find that the challenged advertising was
11 government speech. Instead, the Eighth Circuit found that
12 government speech is relevant only to First Amendment challenges
13 to the speech's content, not to challenges to compelled funding
14 for the speech, and that compelled funding of speech may violate
15 the First Amendment even if the speech in question is the
16 government's. *Id.*, at 556-557.

17 The Supreme Court noted that it had sustained First
18 Amendment challenges to compelled expression in two categories of
19 cases: "true 'compelled speech' cases in which an individual is
20 obliged personally to express a message he disagrees with,
21 imposed by the government; and 'compelled subsidy' cases, in
22 which an individual is required by the government to subsidize a
23 message he disagrees with, expressed by a private entity." *Id.*,
24 at 557. The Supreme Court recognized that it had not previously
25 considered "the First Amendment consequences of government-
26 compelled subsidy of the government's own speech." *Id.*

1 Respondents there argued that the challenged promotional
2 campaigns "differ dispositively from the type of government
3 speech that, our cases suggest, is not susceptible to First
4 Amendment challenge" by pointing to "the role of the Beef Board
5 and its Operating Committee in designing the promotional
6 campaigns, and to the use of a mandatory assessment on beef
7 producers to fund the advertising." *Id.*, at 560.

8 As to the identity of the speaker, respondents argued that
9 "speech whose content is effectively controlled by a
10 nongovernmental entity - the Operating Committee - cannot be
11 considered 'government speech.'" The Supreme Court ruled: "We
12 need not address this contention, because we reject its premise.
13 The message of the promotional campaigns is effectively
14 controlled by the Federal Government itself." *Id.* From this
15 conclusion, the Supreme Court reasoned:

16 We therefore need not label the Operating
17 Committee as 'governmental' or
18 'nongovernmental.' The entity to which
assessments are remitted is the Beef Board,
all of whose members are appointed by the
Secretary pursuant to law. The Operating
Committee's only relevant involvement is
ancillary - it designs the promotional
campaigns, which the Secretary supervises and
approves - and its status as a state actor is
not directly at issue.

22 *Id.*, at 560 n.4. In explaining this conclusion, the Supreme
23 Court stated:

24 The message set out in the beef promotions is
from beginning to end the message established
by the Federal Government. Congress has
directed the implementation of a 'coordinated
25 program' of promotion, 'including paid
26

1 advertising, to advance the image and
2 desirability of beef and beef products.' 7
3 U.S.C. §§ 2901(b), 2902(13). Congress and
4 the Secretary have also specified, in general
5 terms, what the promotional campaigns shall
6 contain, see, e.g., § 2904(4)(B)(i) (campaigns
7 'shall ... take into account' different types
8 of beef products), and what they shall not,
9 see, e.g., 7 CFR § 1260.169(d)
(2004) (campaigns shall not, without prior
10 approval, refer 'to a brand or trade name of
11 any beef product'). Thus, Congress and the
12 Secretary have set out the overarching
13 message and some of the elements, and they
14 have left the development of the remaining
15 details to an entity whose members are
16 answerable to the Secretary (and in some
cases appointed by him as well).

Moreover, the record demonstrates that the
Secretary exercises final approval authority
over every word used in every promotional
campaign. All proposed promotional messages
are reviewed by Department officials both for
substance and for wording, and some proposals
are rejected or rewritten by the Department
... Nor is the Secretary's role limited to
final approval or rejection; officials of the
Department also attend and participate in the
open meetings at which proposals are
developed

This degree of governmental control over the
message funded by the checkoff distinguishes
these cases from *Keller*. There the state
bar's communicative activities to which the
plaintiffs objected were not prescribed by
law in their general outline and not
developed under official government
supervision. Indeed, many of them consisted
of lobbying the state legislature on various
issues ... When, as here, the government sets
the overall message to be communicated and
approves every word that is disseminated, it
is not precluded from relying on the
government speech doctrine merely because it
solicits assistance from nongovernmental
sources in developing specific messages.

Id., at 560-562.

1 The Supreme Court rejected the argument that the beef
2 program does not qualify as "government speech" because it is
3 funded by a targeted assessment on beef producers, rather than by
4 general revenues, thereby giving control to a narrow interest
5 group that will not heed respondents' objections, as opposed to
6 politically accountable legislators:

7 ... The compelled-subsidy analysis is
8 altogether unaffected by whether the funds
9 for the promotions are raised by general
10 taxes or through a targeted assessment.
11 Citizens may challenge compelled support of
12 private speech, but have no First Amendment
right not to fund government speech. And
that is no less true when the funding is
achieved through targeted assessments devoted
exclusively to the program to which the
assessed citizens object

13 Some of our cases have justified compelled
14 funding of government speech by pointing out
15 that government speech is subject to
democratic accountability ... But our
16 references to 'traditional political
controls' ... do not signify that the First
Amendment duplicates the Appropriations
Clause ... or that every instance of
17 government speech must be funded by a line
item in an appropriations bill. Here, the
beef advertisements are subject to political
safeguards more than adequate to set them
18 apart from private messages. The program is
authorized and the basic message prescribed
by federal statute, and specific requirements
for the promotions' content are imposed by
federal regulations promulgated after notice
and comment. The Secretary of Agriculture, a
politically accountable official, oversees
the program, appoints and dismisses the key
personnel, and retains absolute veto power
over the advertisements' content, right down
to the wording. And Congress, of course,
retains oversight authority, not to mention
the ability to reform the program at any
time. No more is required.

1 *Id.*, at 562-564.

2 Finally, the Supreme Court refused to rule on the contention
3 that crediting the advertising to "American Beef Producers"
4 impermissibly uses not only their money but also their seeming
5 endorsement to promote a message with which they do not agree.
6 Respondents had argued to the Supreme Court that
7 "[c]ommunications cannot be 'government speech' ... if they are
8 attributed to someone other than the government; and the person
9 to whom they are attributed, when he is, by compulsory funding,
10 made the unwilling instrument of communication, may raise a First
11 Amendment objection." *Id.*, at 564. The Supreme Court stated:

12 We need not determine the validity of this
13 argument - which relates to compelled *speech*
14 rather than compelled *subsidy* - with regard
15 to respondents' facial challenge. Since
16 neither the Beef Act nor the Beef Order
requires attribution, neither can be the
cause of any possible First Amendment harm.
The District Court's order enjoining
enforcement of the Act and the Order thus
cannot be sustained on this theory.

17 On some set of facts, this second theory
18 might (again, we express no view on the
19 point) form the basis for an as-applied
20 challenge - if it were established, that is,
21 that individual beef advertisements were
22 attributed to respondents. The record,
however, includes only a stipulated sampling
23 of these promotional materials ... and none
24 of the exemplars provides any support for
25 this attribution theory except for the
tagline identifying the funding. Respondents
26 apparently presented no other evidence of
attribution at trial and the District Court
made no factual findings on the point. ...
Whether the *individual* respondents who are
beef producers would be associated with
speech labeled as coming from "America's Beef
Producers' is a question on which the trial

1 record is altogether silent. We have only
2 the funding tagline itself, a trademarked
3 term that, standing alone, is not
4 sufficiently specific to convince a
reasonable factfinder that any particular
beef producer, or all beef producers, would
be tarred with the content of each
trademarked ad.

5 *Id.*, at 564-566.²

6 2. Paramount Land Co., LP v. Cal. Pistachio Com'n.

7 Since these motions for summary judgment were argued and
8 submitted, the Ninth Circuit decided *Paramount Land Co., LP v.*
Cal. Pistachio Com'n, 491 F.3d 1003 (9th Cir. 2007).

9 In *Paramount*, a group of pistachio growers (collectively
10 referred to as *Paramount*) challenged the marketing and
11 promotional activities of the California Pistachio Commission
12 under the First Amendment and on various state law grounds.
13 *Paramount* moved the District Court for a preliminary injunction.
14 The District Court granted the preliminary injunction on the
15 ground that it was unlikely that the California state government
16 exercised effective control over the Pistachio Commission for its
17 expressive activity to qualify as "government speech" under
18 *Johanns*" and that, under *Glickman v. Wileman Brothers & Elliott,*
19 *Inc.*, 521 U.S. 457, 469-470 (1997) and *United States v. United*
20 *Foods, Inc.*, 533 U.S. 405, 415 (2001), the assessments funded by
21 the Pistachio Commission probably were not part of a larger
22 economic regulatory scheme so as to make them constitutionally
23

25 2 In this case, there is no attribution to Plaintiffs of any of
26 the Commission's advertising and promotions.

1 permissible under *Glickman*. 491 F.3d at 1008. On appeal, the
2 Ninth Circuit addressed "whether this generic advertising is 'the
3 Government's own speech and therefore is exempt from First
4 Amendment scrutiny' under the Supreme Court's analysis in *Johanns
5 v. Livestock Marketing Association.*" *Id.*, at 1005. *Paramount*
6 describes the state regulation of pistachios:

7 The California state legislature created the
8 Pistachio Commission 'to enhance and preserve
the economic interests of the State of
California,' by among other activities,
9 '[i]mplement[ing] public policy through [its]
expressive conduct.' Cal. Food & Agric. Code
10 § 63901. The Pistachio Commission
administers the Pistachio Act and supports
11 the pistachio industry through advertising,
marketing, research, and government relations
12 campaigns. See Pistachio Act § 69051.

13 The Pistachio Commission is authorized to
undertake a broad range of activity: (1)
research into production, food safety,
marketing, crop protection and production
materials, (2) promotion of the elimination
of trade barriers, (3) consumer education
regarding the health benefits of pistachios,
14 (4) demand-side regulation to stabilize the
market, (5) analysis of relevant foreign,
federal and state regulation, (6) cooperative
crisis resolution, (7) cooperation with state
and federal agencies in foreign negotiations,
15 and (8) support of industry self-regulation.
See Cal. Food & Agric. Code §§ 63901-63901.3.
This regulatory scheme, which applies to all
16 councils and commissions relating to
agricultural or seafood markets in
California, is designed to 'work subject to,
17 and together with, the constraints placed on
the agricultural industry by state and
federal statutes and regulations and
international restrictions.' *Id.* § 69301.4.

18 The Pistachio Commission has nine members,
19 eight selected by California pistachio
growers and one selected by the Secretary of
20 the California Department of Food and

1 Agriculture ('CDFA'). Pistachio Act § 69031.
2 Acting through committees chaired by the
3 commissioners, the Commission meets three
4 times a year and employs a full-time staff to
5 handle daily operations. In addition to
6 appointing one member of the committee [sic],
7 the Secretary of the CDFA (or a designee),
8 may attend and participate in the Pistachio
9 Commission or committee meetings as an *ex*
10 *officio* member. *Id.* Like other entities in
11 the state government, the Commission is
12 subject to transparency and ethics
13 regulations designed to promote public
14 accountability.

15 The Secretary retains broad statutory
16 authority to: (1) review and approve the
17 Pistachio Commission's annual budget and
18 planned activities, (2) conduct fiscal and
19 compliance audits, (3) approve nomination and
20 election procedures, (4) decide appeals from
21 grievance petitions filed by growers, and (5)
22 suspend or discharge the Commission's
23 president. See *id.* §§ 69051, 69069, 69092.
24 The Secretary may also require the Pistachio
25 Commission to 'correct or cease any activity
26 or function that is determined by the
secretary not to be in the public interest or
to be in violation of [the Pistachio Act].'
Id. § 69032. Although the Secretary has
ultimate authority over the Commission's
budget, operations, and planning, the
Secretary has declined to exercise many of
his more specific statutory powers.

Paramount and its various affiliated entities
are the largest producers of pistachios in
California, together paying between 25 and 30
percent of the Pistachio Commission's total
assessments in recent years. The expressive
activity that has attracted Paramount's ire
centers around generic print and public
relations advertising campaigns for
California pistachios. The most recent
campaign features the logo 'California
Pistachios' and the slogan 'Grab a Handful.'
The campaign included print advertising in
magazines, media mailings, a satellite tour,
talk-show appearances by spokesperson Jane
Seymour, and promotion at the retail level
(including point-of-sale promotional

1 materials, price recommendations, and
2 advertising incentives). Paramount maintains
3 that these campaigns are 'ineffective in
4 augmenting pistachio sales,' 'do not
5 adequately feature the nuts themselves,' and
which are to 'increase sales by
differentiating its product from competitor's
products.'

6 Paramount also targets the Pistachio
7 Commission's government relations activities,
8 which are coordinated by a political
consultant who hires lawyers to represent the
industry before the International Trade
Commission and the Commerce Department, and
to lobby government entities on behalf of the
pistachio industry. Paramount complains that
the Pistachio Commission has 'not done enough
to protect the domestic pistachio industry
from foreign pistachios.'

12 These offending activities [of the Pistachio
13 Commission complained of by Paramount] are
14 funded by mandatory assessments paid by
pistachio producers and importers (via
processors who deduct dues from the amount
they pay the producers). See *id.* §§ 69081 &
15 69085. Failure to pay invites financial
penalties and possible enforcement action by
the Pistachio Commission. *Id.* §§ 69088-93.
The majority of the Commission's annual
16 budget, which has fluctuated between \$6.6
million and almost \$8 million in recent
17 years, is dedicated to the challenged
18 expressive activity.

19 491 F.3d at 1006-1007. The Ninth Circuit then describes federal
20 regulation of pistachios:

21 In 2004, the United States Secretary of
Agriculture issued a marketing order for
22 California pistachios under the Agricultural
Marketing Agreement Act of 1937 . . . , 7 U.S.C.
23 § 601 et seq. See 7 C.F.R. § 983 (the
'Marketing Order'). The Marketing Order
24 regulates two broad areas of the pistachio
industry: aflatoxin levels and minimum
25 quality levels. *Id.* § 938.38-39. The
Marketing Order makes no mention of

1 promotion, marketing, advertising, research,
2 government relations or other potential
3 expressive activity to be carried out by the
4 administrative committee established by the
federal regulations. The committee may
'deliberate, consult, cooperate and exchange
information with the California Pistachio
Commission.' 7 C.F.R. § 983.71.

5 *Id.*, at 1007.

6 Based on the Supreme Court's decision in *Johanns*, the Ninth
7 Circuit ruled that Paramount had not shown a likelihood of
8 success on the merits of the First Amendment claim:

9 The framework of statutes and regulations
10 governing the Pistachio Commission and its
activities essentially mirrors the scheme
11 addressed in *Johanns*. Although the state of
12 California may, in practice, exercise less
oversight over the Pistachio Commission than
the Secretary of Agriculture exercises over
13 the Beef Board, on the record developed thus
far, that distinction is not enough to
differentiate the activities of the Pistachio
14 Commission from those of the Beef Board.

15 The structure of the Pistachio Commission and
16 its relationship to the State of California
is nearly identical in design to that of the
17 Beef Board at issue in *Johanns*. The
Pistachio Commission consists of nine
18 members, of which eight are elected by
industry members and one is appointed by the
19 Secretary of the CDFA.⁴ The Secretary must
also concur in any nomination and election
procedures adopted by the Pistachio
20 Commission. Pistachio Act § 69069.

21 The Pistachio Commission is directed to
22 'promote the sale of pistachios by
advertising and other promotional means,' *id.*
23 § 69051(i), while the Beef Board is tasked
with 'carrying out a coordinated program of
24 promotion and research designed to strengthen
the beef industry's position in the
marketplace and to maintain and expand
domestic and foreign markets and uses for
25 beef and beef products.' 7 U.S.C. § 2901(b).

1 The Secretary of the CDFA is authorized to
2 attend and participate in the meetings where
3 promotional activities are planned, Pistachio
4 Act § 69041, just as the Secretary of
5 Agriculture or his designee may attend the
6 meetings where the Beef Board develops
7 marketing plans, *see* 7 C.F.R. § 1260.168(h).
8 As a practical matter, the Secretary of the
9 CDFA or his representative routinely attends
10 Commission meetings.

11 The Secretary of Agriculture approves the
12 Beef Board's detailed plans for promotional
13 or marketing activities. *See* 7 C.F.R. §§
14 1260.150(f)-(g) & 1260.169. Similarly, the
15 Pistachio Commission must submit to the
16 Secretary of the CDFA, for his concurrence,
17 'an annual statement of contemplated
18 activities authorized [by the Pistachio Act],
19 including advertising, promotion, marketing
20 research, and production research.'

21 Pistachio Act § 69051(q).

22 Although there is no provision in the
23 Pistachio Act allowing the Secretary of the
24 CDFA to remove members of the Pistachio
25 Commission, *compare Johanns*, 544 U.S. at 563
26 ..., the Pistachio Act authorizes the
27 Secretary of the CDFA to 'correct or cease
28 any existing activity or function that is
29 determined by the secretary not to be in the
30 public interest or in violation of [the
31 Pistachio Act]'. Pistachio Act § 69032.
32 And, the Secretary may suspend or discharge
33 the Commission's president if he has engaged
34 in any conduct that the Secretary determines
35 is not in the public interest. *Id.* §
36 69051(d).

37 Other factors also demonstrate the
38 Secretary's control over the Commission. For
39 example, growers dissatisfied with any
40 Commission activity may file a grievance,
41 which can be directly appealed to the
42 Secretary. *Id.* § 69092. The Secretary also
43 must approve the Commission's annual budget
44 before the Commission may disburse funds, *id.*
45 § 69051(p), and he may conduct a separate
46 fiscal compliance audit whenever he deems
47 such an audit is necessary, *id.* § 69051(h).
48 Given the similarities to *Johanns* and the

1 level of control vested in the Secretary,
2 Paramount has not yet demonstrated that the
3 Pistachio Commission should be classified as
4 a nongovernmental entity.
5

6 Paramount argues that *Johanns* should not
7 apply here because, in practice, the
8 Secretary of the CDFA exercises 'no control'
9 over the Pistachio Commission's promotional
10 and marketing activities. In *Johanns*, the
11 Court held that the speech at issue in that
12 case more than met the requirements for
13 qualifying as government speech. See 544
14 U.S. at 563 ... (holding that 'the beef
15 advertisements here are subject to political
16 safeguards more than adequate to set them
17 apart from private messages'). However,
18 *Johanns* did not set a floor or define minimum
19 requirements. *Id.*

20 At this stage of the proceedings, we cannot
21 say that Paramount is likely to overcome the
22 barrier of *Johanns*. Paramount has not made a
23 sufficient showing that the Secretary of the
24 CDFA exercises inadequate oversight over the
25 activities of the Commission. To be sure,
26 the Secretary of the CDFA exercises less
control over the Pistachio Commission than
the Secretary of Agriculture exercised over
the Beef Board. Nonetheless, the marketing
and promotional plans submitted to the CDFA
include a significant amount of detail. For
example, they include a general description
of the advertisements, detail the themes to
be emphasized, the actors to be used, the
demographics to be targeted, and the media to
be employed. Last year's budget noted that
the 'proposed advertising campaign will
feature three generations of [Jane] Seymour's
family ... making the connection that heart
disease is not a discriminator of age, and
that California pistachios can be an
important part of lifetime heart health.'
The proposal describes the specific magazines
in which the advertisements will run, notes
the approximate timing of their publication
(in February, to coincide with the Super
Bowl, for example), and often includes
specific words and imagery to be used. The
overall budget also includes specific line-
item budgets for promotional, advertising,

1 marketing, and research activities, a report
2 from a retained private advertising agency
3 that discusses the advertisements generally
4 and each selected publication and promotional
activity specifically, and a 15-page overview
of the entire public relations strategy,
including advertising, marketing, and
promotions.

5 Although the Secretary has not rejected or
6 edited proposals, or taken a particularly
active role in meetings, this passivity is
7 not an indication that the government cannot
exercise authority. See *Johanns*, 544 U.S. at
8 560 ... (focusing on effective control). The
Secretary, through his staff, retains
9 authority to control both the activities and
the message. The fact that he has not played
an active role cannot be equated with
abdicating of his role. Just as '[t]he
10 Secretary of Agriculture does not write [the
copy of the beef advertisements] himself' for
11 the Beef Board, neither should such oversight
12 be required for the California scheme to pass
13 constitutional muster. *Id.*

14 We acknowledge that there are differences in
15 actual oversight between the beef scheme and
the pistachio scheme, but these factual
16 differences are legally insufficient to
justify the injunction. To draw a line
17 between these two approaches to oversight
risks micro-managing legislative and
regulatory schemes, a task federal courts are
18 ill-equipped to undertake. 'The message set
out in the [pistachio] promotions is from
19 beginning to end the message established' by
the state government. *Id.*⁵

20 . . .

21 ⁴Paramount makes much of the fact that in
22 *Johanns*, the entire Beef Board was
23 'appointed' by the Secretary of Agriculture,
but only one member of the Pistachio
24 Commission is 'appointed' by the Secretary of
the CDFA. This distinction, while accurate,
is somewhat exaggerated. The Beef Board is
25 appointed by the Secretary of Agriculture
from among a list of candidates nominated by
26 the trade association. 7 C.F.R. §

1 1260.141(b). Both boards are dominated by
2 industry appointees, not independent third
3 party board members.

4 ⁵Because we rest our analysis on *Johanns*, we
5 decline to reach the district court's
6 resolution of the compelled speech challenge
7 under *Glickman* and *United Foods*.

8 491 F.3d at 1010-1012.

9 3. Message Mandated by California Legislature.

10 The California Table Grape Commission was established and is
11 regulated pursuant to Division 22 (Marketing Advisory and
12 Promotional Agency Laws) of the California Food & Agriculture
13 Code.

14 California Food & Agriculture Code § 63901, as enacted in
15 1995, is the California Legislature's statement of purpose:

16 The Legislature hereby finds and declares
17 that the commissions and councils established
18 pursuant to this division advance the
19 interests of the State of California in that
20 they do all of the following:

21 (a) Reflect a continuing commitment on the
22 part of the State of California to its
23 agricultural and seafood industries. The
24 state's agricultural and seafood industries
25 are a source of substantial employment for
26 the state's citizens, produce needed tax
 revenues for the support of state and local
 government, encourage responsible stewardship
 of valuable land and marine resources, and
 produce substantial necessary food and fiber
 for the state, nation, and world, at
 reasonable costs.

27 (b) Represent a policy of support for self-
28 help, public-private partnerships. These
29 commissions and councils are particularly
30 important for the continued success of
31 California agriculture and seafood because of
32 the unique nature of agricultural and seafood
33 production, which tends to be decentralized

1 with many small entities operating in diverse
2 locations.

3 (c) Are intended to provide benefit to the
4 entire industry and all of the people of this
5 state. The commissions and councils are not
6 enacted, and are not intended to produce
7 measurable benefit, on an individual basis,
8 and their successes should be evaluated
9 accordingly by analyzing the extent to which
10 the commissions and councils have improved
11 the overall conditions for the particular
12 commodity subject to the commission's or
13 council's jurisdiction.

14 (d) Are intended to enhance the image of
15 California agricultural and seafood products
16 to increase the overall demand for these
17 commodities. In this fashion, the
18 Legislature intends that the commissions and
19 councils operate primarily for the purpose of
20 creating a more receptive environment for the
21 commodity and for the individual efforts of
22 those persons in the industry, and thereby
23 compliment those individual, targeted, and
24 specific activities.

25 (e) Are now more necessary and valuable than
26 ever before as a result of declining support
27 from the federal government and the
28 increasing competition attributable to the
29 global marketplace.

30 Section 63901 was amended in 2001. As amended, Section 63901
31 sets forth the California Legislature's declaration:

32 [T]he agricultural and seafood industries are
33 vitally important elements of the state's
34 economy and are supported by state
35 established commissions and councils
36 specified in this division that are mandated
37 to enhance and preserve the economic
38 interests of the State of California and are
39 intended to do all of the following:

40 (a) Implement public policy through their
41 expressive conduct. The programs conducted
42 by these commissions and councils are among
43 the broad range of state-mandated regulatory
44 programs that are funded by the public

1 through user fees assessed in accordance with
2 each person's relationship to a particular
3 program.

4 (b) Reflect a continuing commitment by the
5 State of California to its agricultural and
6 seafood industries that are integral to its
7 economy. These industries are a source of
8 substantial employment for the state's
9 citizens, produce needed tax revenues for the
10 support of state and local government,
11 encourage responsible stewardship of valuable
12 land and marine resources, and produce
13 substantial necessary food and fiber for the
14 state, nation, and world.

15 (c) Represent a policy of support for persons
16 engaged in the agricultural and seafood
17 industries, which are critically important
18 elements of the state's economy. These
19 commissions and councils are particularly
20 important for the continued success of
21 California's unique agricultural and seafood
22 industries which tend to be decentralized
23 with many small entities operating in diverse
24 locations.

25 (d) Provide benefit to the entire industry
26 and all of the people of this state. The
27 commissions and councils are not enacted, and
28 are not intended to produce measurable
29 benefit, on an individual basis, and their
30 successes should be evaluated by analyzing
31 the extent to which they have improved the
32 overall conditions for the particular
33 commodity subject to the commission's or
34 council's jurisdiction with resulting benefit
35 to the overall economy of the state.

36 (e) Enhance the image of California
37 agricultural and seafood products to increase
38 the overall demand for these commodities. In
39 this fashion, the Legislature intends that
40 the commissions and councils operate
41 primarily for the purpose of creating a more
42 receptive environment for the commodity and
43 for the individual efforts of those persons
44 in the industry, and thereby compliment
45 individual, targeted, and specific
46 activities.

1 Section 63901.3, enacted in 2001, provides:

2 The Legislature further finds and declares
3 that the commission and council activities
4 are essential to the goals and interests of
the State of California that include, but are
not limited to, all of the following:

5 (a) Research, including, but not limited to,
6 production research, food safety research,
marketing research and trends analysis, and
research relating to crop protection and
production materials.

8 (b) Elimination of tariff and nontariff trade
barriers.

9 (c) Consumer education relating to the health
10 and other benefits of using and consuming
agricultural and seafood products.

11 (d) Consumer education relating to
12 environmental protection and conservation.

13 (e) Demand-side regulation that stabilizes
14 the flow of product to market through
promotion.

15 (f) Analysis of the impact of federal, state
and foreign regulation.

16 (g) Cooperative crisis resolution that
17 impacts public health and safety and the
continued stability of the industry.

18 (h) Participation with state and federal
19 agencies in negotiating with other
governments relating to market access issues
such as phytosanitary issues, shipping
protocols, crop protection residues,
packaging, labeling, and other issues raised
by countries imposing trade barriers on the
import of agricultural and seafood products
into their markets.

20 (i) Industry self-regulation to establish and
21 maintain grade, size and maturity standards
22 and to stabilize the flow of product to
market.

23 In Section 63901.4, enacted in 2001, the Legislature:

1 [F]urther finds and declares that mandated
2 cooperative efforts engaged in by the
3 commissions and councils have proven to be
4 effective methods to avoid economic waste and
5 maintain stable agricultural markets. These
6 cooperative efforts are intended to work
7 subject to, and together with, the
8 constraints placed on the agricultural
9 industry by state and federal statutes and
10 regulations and international restrictions.

11 Section 63902, amended in 2001, provides:

12 In addition to any specific provisions
13 regarding grievance procedures, and
14 consistent with the nature of the commissions
15 and councils established pursuant to Part 2
(commencing with Section 64001) and the
desire to resolve conflicts in the most
timely and cost-effective manner, any person
subject to this division shall file a
grievance with the appropriate commission or
council, and exhaust all administrative
remedies prior to the initiation of any
litigation based on a claim, express or
implied, that the activities undertaken by
the commission or council do not directly or
materially advance the interests of the State
of California as set forth in this part.

16 Section 63903, enacted in 1997, provides that, "[i]n addition to
17 the authority granted to any commission by Part 2 (commencing
18 with Section 64001), those commissions may commence or
19 participate in administrative and civil actions relative to the
20 activities of the commission." Pursuant to Section 63904,
21 enacted in 1998, "[t]he Legislature finds and declares that the
22 councils and commissions operating pursuant to this division are
23 duly constituted authorities of this state for purposes of
24 subdivision (i) of Section 610 of Title 7 of the United States
25 Code." 7 U.S.C. § 610(i) provides:

26 The Secretary of Agriculture upon the request

1 of the duly constituted authorities of any
2 State is directed, in order to effectuate the
3 declared policy of this chapter and in order
4 to obtain uniformity in the formulation,
5 administration, and enforcement of Federal
6 and State programs relating to the regulation
7 of the handling of agricultural commodities
8 or products thereof, to confer with and hold
9 joint hearings with the duly constituted
10 authorities of any State, and is authorized
11 to cooperate with such authorities; to accept
12 and utilize, with the consent of the State,
13 such State and local officers and employees
14 as may be necessary; to avail himself of the
15 records and facilities of such authorities;
16 to issue orders (subject to the provisions of
17 section 608c of this title) complementary to
18 orders or other regulations issued by such
19 authorities; and to make available to such
20 State authorities the records and facilities
21 of the Department of Agriculture: *Provided*,
22 That information furnished to the Secretary
23 of Agriculture pursuant to section 608d(1) of
24 this title shall be made available only to
25 the extent that such information is relevant
26 to transactions within the regulatory
jurisdiction of such authorities that the
information so furnished shall be kept
confidential by them in a manner similar to
that required of Federal officers and
employees under the provisions of section
608d(2) of this title.

Section 63905, enacted in 2001 and amended in 2006, provides:

(a) Any commission or council may petition
the secretary to adopt or administer any
activity authorized pursuant to the
California Marketing Act of 1937 (Chapter 1
(commencing with Section 58601) of Part 2 of
Division 21) relating to the commodity that
is covered by any commission or council.
Adoption and administration of the activity
by any commission or council shall be in
accordance with the fact.

(b) Any commission or council may petition
the secretary to administer any activity that
the commission or council is authorized to
engage in, and that is authorized pursuant to
the California Marketing Act of 1937 (Chapter

1 1 (commencing with Section 58601) of Part 2
2 of Division 21), relating to the commodity
3 that is covered by any commission or council.
4 If the secretary accepts the petition, the
5 commission or council shall reimburse the
6 secretary for his or her actual cost for
7 administering the activity. The secretary
8 may waive referendum under the act, if
9 following a hearing, the secretary determines
10 that there is no substantial question of
11 opposition to doing so among affected
12 assessment payers. Administration of the
13 activity by the secretary shall be in
14 accordance with the act.

8 (c) As determined by the secretary, the
9 governing body of the commission or council
10 may serve as the advisory board with respect
11 to any activity recommended and approved
12 pursuant to this section.

11 (d) As used in this section, 'substantial
12 question of opposition' means opposition to
13 the substance of the petition among currently
14 affected assessment payers, and is not
15 intended to mean a particular number of
16 assessment payers.

15 The 2001 amendments and enactments were part of AB 1612.

16 The Report of the California Senate Agriculture and Water
17 Resources Committee explains the reasons for the 2001 amendments
18 and enactments:

19 Existing law ... allows for the establishment
20 of commissions and councils to advance the
21 interests of California agriculture and
22 seafood. The Legislature declares that these
23 commissions and councils are established to
24 reflect a commitment to California
25 agriculture and seafood industries, represent
26 a policy of support for self-help and public-
private partnerships, provide a benefit to
the entire industry and all Californians, and
are intended to enhance the image of
California agriculture and seafood products.
Each commission and council is established
and administered according to its own
statutory guidelines. According to

1 information provided by the California
2 Department of Food and Agriculture,
3 California has 51 advisory boards, councils
4 and commissions.

5 A series of cases and court rulings have
6 clouded marketing orders, commissions, and
7 councils [sic] legal status based on the
8 First Amendment. In 1996, The [sic] United
9 States Supreme Court held that the First
10 Amendment was not violated when agricultural
11 marketing orders, as part of a larger
12 regulatory scheme, required fruit producers
13 of California tree fruit to pay assessments
14 for product advertising (Glickman v. Wileman
15 Brothers and Elliott, 521 U.S. 457). In
16 [sic] June 25, 2001, the United States
17 Supreme Court found that a federal marketing
18 order covering generic mushroom promotion was
19 a violation of the First Amendment (United
20 States et al. [sic] v. United Foods, Inc., No.
00276, Decided June 25, 2001). The United
Foods court found that no corollary to
Glickmans cooperative marketing structure
existed. The promotion activities the
opponent was required to support was not
directly associated with other regulatory
activities as required in Glickman.

21 Many legal analysts believe the result of
22 these cases is a spectrum. On one end is
23 acceptable compelled speech if it is
24 associated with a regulatory program. On the
25 other end of the spectrum are programs that
compel speech that are not associated with a
comprehensive regulatory scheme. At this
point, there is not a bright line determining
where the appropriate level of regulation or
identifying the necessary activities required
for these programs.

21 PROPOSED LAW

22 This measure states that the agriculture and
23 seafood industries are vitally important
24 elements of the state's economy and are
25 supported by state established commissions
and councils mandated to enhance and preserve
the economic interests of California.

26 This bill contains findings and declarations

1 stating that commissions and councils
2 implement public policy through their
3 expressive conduct and these programs are
4 among the broad range of state mandated
5 regulatory programs that are funded by the
6 public generally through user fees assessed
7 in accordance with each persons [sic]
8 relationship to a particular program.

9
10 The bill amends several existing findings
11 with clarifying language and further
12 articulating the importance of these programs
13 to the state's economy.

14 The bill states additional findings
15 concerning these programs importance to
16 California's interests and that these
17 programs activities include but are not
18 limited to the following:

19 Research
20 Elimination of tariff and non tariff trade
21 barriers
22 Consumer education relating to health and
23 other benefits of using and consuming these
24 products
25 Demand side regulation
26 Analysis of government regulation
27 Cooperative crisis resolution
28 Participation in negotiations with other
29 governments relating to market access issues
30 Industry self regulation to establish and
31 maintain grade, size, and maturity standards
32 and to stabilize the flow of product.

33
34 The final finding declares that mandated
35 cooperative efforts engaged in by the
36 commissions and councils are the best methods
37 to avoid economic waste and maintain stable
38 markets and work in cooperation with
39 government regulation.

40 ...

41
42 The bill allows commissions and councils to
43 petition the Secretary to engage in any
44 activity authorized by the California
45 Marketing Act of 1937. This bill would
46 require a successful referendum according to
47 the statutory requirements of the Marketing
48 Act ... and approval by the Secretary ...

1 before the new activity could be implemented
2 . . .
3 . . .

4 COMMENTS

5 1. According to the sponsor, the reason the
6 additions to the declarations and findings
7 are included is to strengthen commissions and
8 councils directives and to clarify their
9 importance and duties. By strengthening the
10 findings and declarations and expressly
11 stating many of the various important
12 activities in which these programs
13 participate, it clarifies these programs
14 importance to California's economy and
15 interest and how integral these programs are
16 to other government regulatory and non-
17 regulatory activities.

18 2. This bill expands the authorized powers
19 of the various commissions and councils which
20 have been established to promote California
21 agriculture and seafood. Under current law,
22 each commission or council is allowed to
23 engage in only those activities authorized by
24 its specific statutory guidelines. This
25 measure would allow each commission and
26 council to engage in any of the activities
27 included in the California Marketing Act of
28 1937.

29 3. Although this bill does expand the scope
30 of activities that can be undertaken by
31 commissions and councils, the increased
32 activities can only be initiated after a
33 successful referendum of affected members
34 according to the requirements of the act.
35 Furthermore, the Secretary still retains the
36 authority to approve marketing programs and
37 activities recommended by the governing
38 boards of the commissions and councils.

39 . . .

40 The Commission notes that § 65572(h) empowers the Commission
41 "[t]o promote the sale of fresh grapes by advertising and other
42 similar means for the purpose of maintaining and expanding

1 present markets and creating new and larger intrastate,
2 interstate and foreign markets for fresh grapes; to educate and
3 instruct the public with respect to fresh grapes; and the uses
4 and time to use the several varieties, and the healthful
5 properties and dietetic value of fresh grapes". Section 65572(i)
6 empowers the Commission, in its discretion, "to educate and
7 instruct the wholesale and retail trade with respect to proper
8 methods of handling and selling fresh grapes; to arrange for the
9 performance of dealer service work providing display and other
10 promotional materials; to make market surveys and analyses; and
11 to present facts to and negotiate with state, federal and foreign
12 agencies on matters which affect the marketing and distribution
13 of fresh grapes; and to undertake any other similar activities
14 which the commission may determine appropriate for the
15 maintenance and expansion of present markets and the creation of
16 new and larger markets for fresh grapes".

17 The Commission argues that Plaintiffs do not dispute that
18 the Commission has followed these statutory directives and that
19 Plaintiffs, having dismissed with prejudice their challenges to
20 particular activities conducted by the Commission, raise only a
21 facial challenge to the Ketchum Act as a whole. The Commission
22 asserts: "[I]f Plaintiffs challenge only the overall message of
23 the program - a message that is defined by statute - Plaintiffs
24 cannot plausibly claim that the speech they challenge is not
25 government speech." Therefore, the Commission contends, the
26 level of oversight of the Commission's activities by the CDFA is

1 irrelevant.

2 In contending that Plaintiffs raise only a facial challenge
3 to the Ketchum Act, the Commission relies on its Statement of
4 Undisputed Facts:

5 CUF No. 203: Plaintiff Susan Neill Company does not object
6 to the message of the Commission's consumer education, research,
7 or market access activities. Its only objection is that it does
8 not want to fund these activities. See Neill Dep. 62:1-66:3,,
9 83:24-84:12, 96:5-10, May 17 2004. To the extent The Susan Neill
10 Company objects to any of the Commission's messages, it is
11 principally an objection to the advertising of all California
12 table grapes as opposed to Lucas Brothers' table grapes. See if.
13 at 33:2-34:12.

14 Plaintiffs' dispute CUF No. 203, asserting in pertinent
15 part:

16 [T]he Susan Neill Company and Lucas Bros.
17 believe that the millions of dollars spent by
the Commission on generic advertising hurts a
18 company like Plaintiffs to urge buyers to buy
Plaintiffs' product not 'generic' table
grapes produced in California and grown by
19 others (response to interrogatory number 13,
set number two, Exhibit 'I' to Boynton
Declaration). Plaintiff [sic] contends that
virtually everything that the Commission does
21 is some form of speech-communication, the
administration of same, as well as the
salaries, benefits, travel expenses for
22 speech/communication related activities.
'That obviously would include bird
sanctuaries, scholarship funds, dinners,
charter planes, lavish parties, limousines,
24 payoffs to buyers of table grapes, and when
these activities cannot be quantified as
reducing demand for Plaintiffs' table grapes,
when the Commission members are part of this

extravagance paid for by Plaintiffs, and the Commission members, who are Plaintiffs' competitors are "high-styling" with buyers of table grapes, that could have an indirect reduction of demand for Plaintiffs' table grapes, as well as the fact that since Plaintiffs are forced to fund such nonsense, it is less money that Plaintiffs have in promoting and selling its own table grapes.' Neill response to interrogatory number 14, set number 2. '[Neill and Lucas], stated in response to the previous interrogatory, does not seek the Commission's help with respect to any of Plaintiffs' farming operations, cultural methods, varieties, sales or promotion. Those would be actions on behalf of Plaintiff that showed that it does not want to be forced to associate with or financially support the Commission, its speech efforts, or its claims that it represents Plaintiff. Plaintiff has hired an attorney to represent it in this lawsuit against the Table Grape Commission and expended thousands of dollars for the attorney to contest the constitutionality and the legitimacy of the Commission. If Plaintiff had agreed with the Commission and its speech efforts, Plaintiff would not be pursuing this 8 year effort to have a court find that the Commission is unconstitutional. To reiterate, Plaintiff vehemently disagrees with being forced to associate with and financial support the Commission [sic], its speech efforts and its claim that the Commission represents Plaintiff.' (Neill's response to interrogatory number 16, set number 2). Neill and Lucas vehemently object to any and all expenditures and programs of the Commission. (Response to interrogatory number 17.) Lucas' Bros. objections were the same as Susan Neill's. (See Exhibit '2' to the Declaration of Boynton, Lucas Bros.' responses to interrogatories, set number two, numbers 7, 9, 12, 13, 15, and 16. [sic])

Defendant misstates the deposition testimony of Susan Neill (Exhibit '7' to the Declaration of Boynton (after explaining all of the things that the [sic] Susan Neill Company does to promote and advertise their product (Depo Transcript pages 19-25) Susan

Neill laid into the Commission program, and objects to the Commission engaging in consumer education, objects to it, does not believe it is necessary, believes it is a waste of Neill and Lucas money, the same for research, the same for export activities, and its more than just not wanting to pay the assessments, 'I do not want to be compelled to have to spend money on this when it does nothing for me, and I do not believe that it is useful.' (Depo transcript at 64) Neill also does not like the Commission message, she does not want to pay for it because it is not useful in selling their grapes, she does not like the scholarship program, the bird sanctuary donations, the chartered planes, the limousines, the 'big dinners and cash payoffs to buyers' (Depo at 65): 'I think that they're [Commission] just wasting money. I object to everything they do. *** I object to them spending my money to do it. I don't wish to contribute to that cause.' Depo at page 83, lines 3-16. When asked if there were any other objections that the [sic] Susan Neill Company had she stated 'I do not like their message. I don't like the Commission. I don't want to be associated with it. They're - I don't like to spend my money on it. I don't want to be compelled to.' Page 83, Depo transcript, lines 17-23.

CUF No. 204: Plaintiff Lucas Brothers does not object to the message of the Commission's trade management activities directed to retailers, phytonutrient research, or market access activities. Its only objection is that it could spend its assessment dollars more profitably. See Lucas Dep. 60:23-61:14; 64:10-16; 65:19-66:5, May 17, 2005. To the extent Lucas Brothers objects to any of the Commission's messages, it is principally an objection to the advertising of all California table grapes as opposed to his table grapes. See *id.* at 58:14-22, 59:9-21.

Plaintiffs dispute CUF No. 204 on the same grounds as set

1 forth in connection with CUF No. 203. Plaintiffs add that the
2 Commission misstates the deposition testimony of George Lucas:

3 Lucas objects to the Commission's
4 advertising, he objects to the Commission's
research, he objects to the Commission itself
because it is made up of his competitors,
5 Lucas believes that he could use the
assessments much more profitably promoting
and advertising his table grapes, he feels
the same about the Commission's activities
with respect to foreign markets, and he does
not like the Commission's expenditures for
8 extravagant things. Lucas Depo pages 60-66;
Exhibit '8' to Declaration of Boynton.

9 CUF No. 206: Even though Delano Farms receives all of the
10 reports and correspondence sent out by the Commission to growers
11 explaining what the Commission is doing . . . , Delano Farms has not
12 raised any objection to the substance of any of the Commission's
13 nonadvertising activities. See Middleton Dep. 35:5-18; 81:8-
14 84:10, 93:25-94:10. To the extent Delano Farms objects to any of
15 the Commission's messages, it is principally an objection to the
16 advertising of all California table grapes as opposed to Delano
17 Farms's table grapes. See id. 40:19-25.

18 Plaintiffs dispute CUF No. 206, referring to Delano Farms
19 responses to the Commission's interrogatories, set no. 2:

20 After Delano Farms explained the substantial
21 efforts it goes to in planting the best
varieties and growing the best quality,
wherein buyers are asking specifically for
22 Delano Farms' grapes (responses to
interrogatories 9 and 10), and also
explaining the number of branded labels
23 Delano Farms uses for its table grapes
(response to interrogatory 2), as well as
what its substantial sales force does in the
procurement of buyers, sustaining and
25 developing current buyers and for the
26

1 promotion of the company and its product, and
2 the expenditure of countless hours, dollars
3 and efforts developing and maintaining a
4 relationship with prospective and current
5 customers, and understanding their needs
6 (answers to interrogatories 5 and 8), as well
7 as planting of the newer varieties and
8 significant quantity of the varieties in
9 order to supply the major buyers (response to
10 interrogatory 10), and the fact that Delano
11 Farms is the industry leader in terms of
12 acreage planted for one variety, and added to
13 its customer list as a result of the superb
14 quality and quantity (response to
15 interrogatory 11), Delano explained at first
16 that one of its objections to the Commission
17 program by stating (response to interrogatory
18 13) that 'Delano Farms believes that the
19 Commission's advertising efforts, since those
20 efforts are generic only, equating all table
21 grapes produced by one variety to be
22 "generic," fungible, and the same quality is
23 absolutely worthless to Delano Farms in
24 selling its product. Whether the
25 Commission's advertising reduces demand is
26 totally subjective, but Delano Farms believes
that millions of dollars spent on generic
advertising hurts a company like Delano which
desires to urge buyer to buy Delano's
product, not "generic" table grapes produced
in California and grown by others.' (Response
to interrogatory 13)

In response to interrogatory 16, Delano Farms responded: 'Delano, as stated in response to the previous interrogatories, does not seek the Commission's help with respect to any aspects of Delano Farms' farming operations, cultural methods, varieties, sales or promotion. Those would be actions on behalf of Delano that showed it does not want to be forced to associate with or financially support the Commission, its speech efforts or its claims that it represents Delano. (Response to interrogatory 16) In response to interrogatory 17 which [sic] they asked the question as to what funding of the Commission's activities Delano Farms contended constituted compelled speech in violation of the First Amendment, Delano Farms responded: 'Delano Farms contends that

1 virtually all funding activities of the Table
2 Grape Commission are speech/communication
3 related activities, so therefore requiring
4 Delano to fund these speech related
5 activities constitutes compelled speech, or
6 compelled funding of speech. Those
7 activities would include lobbying, promotion,
8 consumer education, merchandising,
9 advertising, promotion, research, salaries,
travel and benefits of the employees to carry
out the same, payments to attorneys, payments
to lobbyists, donations, scholarships, the
Commission's building, the Commission's
meetings, and virtually every activity is
communication, which is speech related
activities.' (Response to interrogatory 18)

10 Citing only a selected portion of Jim
11 Middleton's deposition transcript (Jim
Middleton being the main director and
shareholder of Delano Farms), Mr. Middleton
objected to the Commission's activities far
more than asserted by the Commission. Those
selected portions of Middleton's deposition
transcript is located as Exhibit '9' to the
declaration of Boynton. Therein Mr.
12 Middleton explained a letter that he sent out
13 to table grape growers in January of 1997
(Exhibit '21' to Middleton deposition
transcript, a copy of which is attached
hereto), explaining Delano Farms' position as
14 to why the growers should vote out the
Commission in the next referendum, and
explaining all of the reasons ... Middleton
15 testified that those were Delano Farms'
objections then, and they would be currently
16 the same objections now (2004 when he was
deposed). In said letter, Delano Farms
stated fully its position regarding the
objections to the Commission, what it stands
17 for, and how it is funded. Middleton was
asked at his deposition whether his
objections 'is simply to the mandatory nature
18 of the payment to the Commission.' (Page 44
of depo transcript) Middleton's response was:
19 'We believe in democracy, and what you got
here is a piece of socialism that doesn't
work. And organizations that we belong to
20 that are voluntary are always very effective.
If they aren't, the members say, "see ya
later." When you have to belong to

1 something, it becomes like the United States
2 Department of Commerce. Pretty soon, it is
3 just a big unwieldy thing. And that is what
4 has happened here.' He later stated that the
biggest objection is the structure of the
Commission and the mandatory nature of it.
(Depo transcript at 44)

5 Therefore, the Commission's assertion that
6 Delano Farms' only objection is being
7 required to pay the assessment is absolutely
false, and while it is certainly one of the
reasons, the main reason is the socialistic
nature of the Commission.

8 As the Commission contends, Plaintiffs' objections to the
9 Commissions Statements of Undisputed Fact attack "the general
10 message promoting all California table grapes, as opposed to
11 grapes from a particular grower/shipper, that Plaintiffs attack -
12 to the extent they attack a message delivered by the Commission
13 at all." Plaintiffs have raised no objection to the particular
14 messages created by the Commission itself and do not dispute that
15 the Commission has adhered to the Legislature's instructions.
16

17 Plaintiffs further oppose this aspect of the Commission's
motion by asserting that the "Legislature setting the 'overall
18 message' - forty years ago - is stated only in the loosest,
19 vaguest and most general of terms that the private board of
20 competitors that make up the Commission was to promote the sale
21 of fresh grapes and to educate the public with respect to fresh
22 grapes."

23 Plaintiffs cite several Supreme Court cases which they
24 describe as involving "federal or state regulations dictating
25 what must be said, written or broadcast" and that "[t]hey were
26

1 not government speech".

2 Plaintiffs cite *Thompson v. Western States Medical Center*,
3 535 U.S. 357 (2002), in which the Supreme Court held that the
4 prohibitions in the Food and Drug Administration Modernization
5 Act of 1997 on soliciting prescriptions for, and advertising,
6 compounded drugs amount to unconstitutional restrictions on
7 commercial speech under the *Central Hudson* test; *Rubin v. Coors*
8 *Brewing Co.*, 514 U.S. 476 (1995), wherein the Supreme Court held
9 that § 5(e)(2) of the Federal Alcohol Administration Act,
10 prohibiting beer labels from displaying alcohol content violates
11 the First Amendment's protection of commercial speech under the
12 *Central Hudson* test; *Riley v. National Federation of the Blind of*
13 *North Carolina, Inc.*, 487 U.S. 781 (1988), wherein the Supreme
14 Court held that the North Carolina Charitable Solicitations Act,
15 defining reasonable fees that a professional fundraiser may
16 charge, providing that the professional fundraiser must disclose
17 to potential donors the average percentage of gross receipts
18 actually turned over to the charity, and providing that
19 professional fundraisers may not solicit without an approved
20 license, while volunteers may solicit upon submission of a
21 license application, unconstitutionally infringed on freedom of
22 speech; *Pacific Gas & Electric Co. v. Public Utilities Commission*
23 *of California*, 475 U.S. 1 (1986), in which the Supreme Court held
24 that the PUC's ruling that envelope space in its monthly billing
25 statements that PG&E had used to disseminate a newsletter that
26 contained political editorials, feature stories on matters of

1 public interest, tips on energy conservation and information
2 about utility services and bills was extra space and the
3 ratepayers' property and permitted a group known as Toward
4 Utility Rate Normalization to use the newsletter to raise funds
5 and communicate with ratepayers with no limitation, except to
6 state that its messages were not those of PG&E, impermissibly
7 infringed on PG&E's First Amendment right not to help spread a
8 message with which it disagreed; and *Miami Herald Publishing Co.*
9 *v. Tornillo*, 418 U.S. 241 (1974), where the Supreme Court held
10 that Florida's "right of reply" statute granting a political
11 candidate a right to equal space to answer criticism and attacks
12 on his record by a newspaper and making it a misdemeanor for the
13 newspaper to fail to comply violates the First Amendment's
14 guarantee of a free press.

15 Plaintiffs only provide the citations and do not discuss the
16 applicability of the holdings of these decisions or how any of
17 these cases involves the issue of "government speech" nor
18 compelled subsidies in the context of government speech.
19 Plaintiffs further argue that the decision in *Johanns* was not
20 that Congress set the overall message "because of the absolute
21 weight the court expressly placed over the amount and degree of
22 the government's officious control over everything that was
23 expressed to the public or concocted by the Beef Board."

24 It cannot be disputed that the Commission's programs are
25 mandated by California statutes to implement and further the
26 State's economic and consumer protection purposes for the table

1 grape industry as declared by the California legislature.

2 4. Commission is a Governmental Entity.

3 The Commission asserts that, even if it were necessary to
4 show that the manner in which the Commission conveys the
5 Legislature's messages is "effectively controlled" by a
6 governmental entity other than the Legislature, that test is
7 satisfied here because the Commission itself is a "governmental
8 entity" as a matter of California law. The Commission relies on
9 *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995),
10 to define what entities are considered part of the government for
11 purposes of the First Amendment.

12 In *Lebron*, Lebron created billboard displays that commented
13 on public issues and filed suit claiming that the National
14 Railroad Passenger Corporation (Amtrak) had violated his First
15 Amendment rights by rejecting a display for an Amtrak billboard
16 because of its political nature. The Supreme Court held:

17 [W]here, as here, the Government creates a
18 corporation by special law, for the
19 furtherance of governmental objectives, and
20 retains for itself permanent authority to
appoint a majority of the directors of that
corporation, the corporation is part of the
Government for purposes of the First
Amendment.

21 513 U.S. at 400.

22 The Commission contends that the Supreme Court's decision in
23 *Keller v. State Bar of California*, 496 U.S. 1 (1990), that the
24 State Bar is not a government entity, is not controlling on this
25 issue because 16 of the 22 members of the Board of Governors are
26

1 directly elected by State Bar members, while, under the Ketchum
2 Act, the Secretary of the CDFA appoints the entire Commission.

3 In *Keller*, the Supreme Court addressed whether the
4 California State Bar is a governmental agency for purposes of the
5 First Amendment under the United States Constitution. In ruling
6 that it was not, the Supreme Court held:

7 Of course the Supreme Court of California is
8 the final authority on the 'governmental'
9 status of the State Bar of California for
10 purposes of state law. But its determination
11 that respondent is a 'government agency,' and
12 therefore entitled to the treatment accorded
13 a governor, a mayor, or a state tax
14 commission, for instance, is not binding on
15 us when such a determination is essential to
16 the decision of a federal question. The
17 State Bar of California is a good deal
18 different from most other entities that would
19 be regarded in common parlance as
20 'governmental agencies.' Its principal
21 funding comes, not from appropriations made
22 to it by the legislature, but from dues
23 levied on its members by the board of
24 governors. Only lawyers admitted to practice
25 in the State of California are members of the
26 State Bar, and all ... lawyers admitted to
practice in the State must be members.
Respondent undoubtedly performs important and
valuable services for the States by way of
governance of the profession, but those
services are essentially advisory in nature.
The State Bar does not admit anyone to the
practice of law, it does not finally disbar
or suspend anyone, and it does not ultimately
establish ethical codes of conduct. All of
those functions are reserved by California
law to the State Supreme Court

27 There is, by contrast, a substantial analogy
28 between the relationship of the State Bar and
29 its members, on the one hand, and the
30 relationship of employee unions and their
31 members, on the other. The reason behind the
32 legislative enactment of 'agency-shop' laws
33 is to prevent 'free riders' - those who

receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay their dues - from avoiding their fair share of the cost of a process from which they benefit. The members of the State Bar concedely do not benefit as directly from its activities as do employees from union negotiations with management, but the position of organized bars has generally been that they prefer a large measure of self-regulation to regulation conducted by a government body which has little or no connection with the profession. The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.

But the very specialized characteristics of the State Bar of California discussed above served to distinguish it from the role of the typical government official or agency. Government officials are expected as part of the democratic process to represent and espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate of issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. . . .

The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the

1 ultimate responsibility of governing the
2 legal profession. Its members and officers
3 are such not because they are citizens or
4 voters, but because they are lawyers. We
5 think that these differences between the
6 State Bar, on the one hand, and traditional
7 government agencies and officials, on the
8 other hand, render unavailing respondent's
9 argument that it is not subject to the same
10 constitutional rule with respect to the use
11 of compulsory dues as are labor unions
12 representing public and private employees.

13 496 U.S. at 11-13.

14 Relying on *Lebron*, the Commission contends that "the Court
15 need not reach the issue decided in [Johanns] - whether the
16 Commission is a non-governmental entity that is nonetheless
17 'answerable' to a government official - because the State of
18 California's creation and control over the Commission through the
19 appointment of its members makes the Commission part of the
20 government for purposes of the First Amendment." The Commission
21 argues that it satisfies the *Lebron* test for a government entity
22 for purposes of the First Amendment because the Commission was
23 created as a corporation by the California Legislature, Cal. Food
24 & Agric. Code §§ 65550-65551, to further governmental objectives,
25 citing Cal. Food & Agric. Code § 65500(h) ("The production and
26 marketing of grapes produces in California for fresh human
 consumption is declared to be affected with a public interest"
 and that the Ketchum Act was enacted "in the exercise of the
 police power of th[e] state.").

1 The Commission emphasizes that the Secretary of CFDA
2 appoints every member of the Commission. See Cal. Food & Agric.

1 Code §§ 65500, 65556, 65563, 65566, 65575.1. Commission members
2 are nominated for appointment by table grape producers through an
3 election process and a government official, the Secretary of the
4 CFDA, makes appointments to the Commission from these nominees.
5 The Commission maintains that this appointment process is no
6 different from that in *Lebron* where six of the corporation's
7 eight externally selected members are appointed by the President
8 with the advice and consent of the Senate, with the statute
9 restricting the President's choices to persons suggested by
10 certain organizations or persons with specified qualifications.
11 *Lebron*, *id.* at 397-398. The Commission observes that members of
12 the Commission may be removed by the Secretary of the CFDA. The
13 Commission stresses that California Government Code § 11000(a)
14 defines "state agency" to include commissions. Other California
15 statutes treat commissions as state agencies, *i.e.*, Government
16 Code § 11121(a) defines "state body" for purposes of the Bagley-
17 Keene Open Meeting Act to include commissions created by statute;
18 Government Code § 6252(f) defines "state agency" to include
19 commissions for purposes of public record requirements;
20 Government Code §§ 82048-82049 defines "state agency" to include
21 commissions and "public officials" as "every member, officer,
22 employee or consultant of a state ... agency" for purposes of the
23 Political Reform Act of 1974. The Commission also refers to
24 California Code of Civil Procedure § 995.220, providing that
25 state agencies and public officials are not required to post a
26 bond in a judicial proceeding.

The Commission argues that "[o]versight by a different government agency is not required for a governmental entity's speech to be considered government speech". The Commission contends that *Lebron* did not consider whether the government-appointed directors of Amtrak were subject to day-to-day oversight in concluding that Amtrak was a government entity.³

Plaintiffs respond that the fact that the Commission is a state agency under California law does not compel the conclusion that the Commission's program is "government speech". Noting that the Supreme Court in *Keller* was not bound by the state's determination of the governmental status of the State Bar for purposes of the First Amendment, Plaintiffs reiterate the Supreme Court's conclusion that the State Bar was not a governmental entity for First Amendment purposes because it received no financial support from the State and argue that *Johanns*, in finding government speech, distinguished *Keller*: "There the state bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision." *Johanns, id.*

³The Commission also cites *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) and asserts that "the [Supreme] Court gave no indication in [those decisions] that speech of a public university would be government speech only if some other government agency exercised oversight over the university."

Neither Rosenberger nor Southworth are helpful as these cases do not involve or discuss the issue of "governmental entity." Both involve First Amendment protections to students who were compelled to pay fees to the universities to fund various activities.

1 544 U.S. at 562. Plaintiffs argue that the Commission's reliance
2 on *Lebron* for the proposition that the Supreme Court treated
3 Amtrak as part of the government for purposes of the First
4 Amendment" is "extremely misleading":

5 The claim in *Lebron* was that the National
6 Railroad Passenger Corp. contended it was not
a government entity for purposes of affording
free speech protection. If the court recalls
7 Hornbook First Amendment law, the First
Amendment only applies if the government is
8 regulating or compelling speech, not a
private party. The issue in *Lebron* was
9 whether or not the National Railroad
Passenger Corp. was a government entity for
10 purposes of providing free speech protection
to *Lebron* [sic] who wished to carry out
11 advertising on the respondent's conveyances,
and the court held that the National Railroad
12 Passenger Corp. was enough of a government
entity in order to provide free speech
protection to *Lebron* [sic]: 'government
13 speech' was never addressed and was never an
issue in that case.

15 The Commission rejoins that Plaintiffs have not contested
16 that two of *Lebron*'s key elements are satisfied; that the
17 Commission was created by the California Legislature as a
18 corporation to further governmental objectives and that a
19 governmental official appoints and can remove members of the
20 Commission. The Commission argues:

21 Plaintiffs incorrectly argue that *Lebron*'s
22 holding applies only to situations where
finding an entity to be governmental would
prevent it from restricting First Amendment
rights But Plaintiffs' one-sided theory
23 - that government-created and controlled
corporations are the government when they
restrict private speech but not when they are
the speaker - finds no basis in *Lebron*'s
reasoning. In *Lebron*, the plaintiff raised
24 two separate arguments why the First
25
26

Amendment applied to Amtrak: (1) that 'Amtrak is not a private entity but Government itself,' and (2) that the First Amendment constrained Amtrak even though it is a private entity because it is 'closely associated with federal entities.' 513 U.S. at 378-379. The Court, however, expressly declined to address the second, more sweeping rationale for applying the First Amendment - the rationale that Plaintiffs reference - because it found that Amtrak is itself the government for purposes of the First Amendment. See *id.* at 392, 400. It may be the case that the speech of a purely private entity - like the restaurant in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) - is not government speech even though the government is sufficiently involved with the private entity to render its conduct 'state action.' But there is no reason to think that an entity that itself is 'part of the Government for purposes of the First Amendment,' *Lebron*, 513 U.S. at 400, is actually just part of the government when that conclusion benefits the plaintiffs and not when it benefits the government corporation. Plaintiffs do not even attempt to articulate a rationale that ends-driven result.

In response to Plaintiffs' contention that *Keller* controls the decision that the Commission is not a government entity for purposes of the First Amendment, the Commission argues that *Keller's* analysis of the funding and membership of the State Bar was necessary only because the structure of the Bar was not determinative, contrary to *Lebron*:

Although the Court in *Keller* did not address the standard it adopted five years later in *Lebron*, that is not at all surprising given both the chronology of the cases and the fact that a super-majority of the State Bar's leadership was not appointed by the government. After *Lebron*, where a government official appoints the entire board of an entity, there is no need to reach the

1 analysis conducted in *Keller*.

2 The Commission maintains that *Johanns* also suggests this result,
3 because *Johanns* distinguished the Operating Committee, only half
4 of whose members were appointed by the government, from the Beef
5 Board, all of whose members were appointed by the Secretary of
6 Agriculture pursuant to law.

7 The record and state and federal statutory schemes in this
8 action undisputedly establish that the Commission is a
9 governmental entity under California law. Plaintiffs' motion for
10 summary judgment on this issue is DENIED and the Commission's
11 motion for summary adjudication is GRANTED.

12 Although this decision makes inapplicable the *Johanns* issue
13 of effective control, *arguendo*, the issue of effective control by
14 the State over the Commission is addressed.

15 5. Effective Control.

16 Plaintiffs contend that the provisions of the Ketchum Act
17 and the California Department of Food and Agriculture's
18 involvement "in the Commission's speech, let alone activities, is
19 not even arguably in the same ball park compared to the control
20 over the make-up and communications of the Beef Board." It
21 follows, Plaintiffs argue, the Commission's program is not
22 "government speech" as that term is defined in *Johanns* and they
23 are entitled to summary adjudication on this issue.

24 Plaintiffs assert that, in contrast to the *Johanns* facts:

25 1. Pursuant to § 65551, the Commission was created as
26 a corporate body, with the power to sue and be sued, to contract,

1 and to have all of the powers of a corporation. Plaintiffs
2 contend that the Beef Board was not set up as a corporate body
3 with the power to sue or be sued.

4 This distinction of corporate capacity between the
5 Commission and the Beef Board has no bearing on the issue of
6 "effective control" as *Johanns* discussed. *Lebron* held that where
7 "the Government creates a corporation by special law, for the
8 furtherance of governmental objectives, and retains for itself
9 permanent authority to appoint a majority of the directors of
10 that corporation, the corporation is part of the Government for
11 purposes of the First Amendment." 513 U.S. at 400. A
12 "'government corporation' means a corporation owned or controlled
13 by the Government of the United States", 5 U.S.C. § 103(1), and
14 "'executive agency' means ... a Government corporation" 5
15 U.S.C. § 105. The California Pistachio Commission is subject to
16 a virtually identical corporate provisions. See Cal. Food & Ag.
17 Code § 69039.

18 2. Under § 65552, the Commission may appoint a
19 manager, a treasurer and a secretary, the compensation of each
20 officer shall be fixed by the Commission, and the officers serve
21 at the pleasure of the Commission with such powers and duties as
22 are delegated to them by the Commission. Plaintiffs note that
23 there is no involvement by the California Secretary of Food and
24 Agriculture in the appointment or compensation of Commission
25 officers.

26 The Commission responds that "it does not appear that the

1 Secretary of Agriculture appoints, removes, or sets the salaries
2 of the staff of the Beef Board, the Beef Board's Operating
3 Committee, or the 'established national nonprofit industry-
4 governed organizations' that actually implement the beef program
5 designed by the Beef Board's Operating Committee." Members of
6 the Beef Board and of the Operating Committee serve without
7 compensation. 7 C.F.R. §§ 1260.148, 1260.165.

8 The California Pistachio Commission is authorized, "subject
9 to Sections 69032 and 69033":

10 (d) To employ a manager to serve at the
11 pleasure of the commission as president and
12 chief executive officer of the commission,
13 and other personnel, including legal counsel,
14 that are necessary to carry out this chapter.
15 The commission may retain a management firm
16 or the staff from any board, commission, or
17 committee of the state to perform the
18 functions prescribed by this subdivision
19 under the control of the commission. If the
20 manager engages in any conduct that the
secretary determines is not in the public
interest or that is in violation of this
chapter, the secretary shall notify the
commission of the conduct and request that
corrective and, if appropriate, disciplinary
action be taken by the commission. If the
commission fails or refuses to correct the
situation or to take disciplinary action
satisfactory to the secretary, the secretary
may suspend or discharge the manager.

21 (e) To fix the compensation for all employees
22 of the commission.

23 California Food & Agriculture Code § 69032 provides in pertinent
part:

24 The secretary may require the [pistachio]
25 commission to correct or cease any existing
26 activity or function that is determined by
the secretary not to be in the public

1 interest or to be in violation of this
2 chapter.

3 If the commission refuses or fails to cease
4 these activities or functions or to make
5 corrections as required by the secretary, the
6 secretary may, upon written notice, suspend
7 all or a portion of the activities or
8 functions of the commission until the
9 cessation or correction of activities or
10 functions as required by the secretary has
11 been accomplished by the commission.

12 Actions of the commission in violation of the
13 written notice are without legal force or
14 effect. The secretary, to the extent
15 feasible, shall issue written notice prior to
16 the commission entering into any contractual
17 relationship affecting the existing or
18 proposed activities or functions that are the
19 subject of the written notice.

20 Pursuant to Section 69033, "[t]he commission or the secretary may
21 bring an action for judicial relief from the secretary's written
22 notice, or from noncompliance by the commission with the written
23 notice, in a court of competent jurisdiction, which may issue a
24 temporary restraining order, permanent injunction, or other
25 applicable relief."

26 There are no comparable provisions in the statutes
27 regulating the Table Grape Commission. However, pursuant to
28 Section 65650.5 "[a]ny person aggrieved by any action of the
29 commission may appeal to the director." Section 65572(f)
30 provides for a State audit of the Commission's books and records.

31 3. Under § 65570, all assessments collected by
32 Commission are deposited in such banks as the Commission
33 designates and are disbursed by order of the Commission.
34 Plaintiffs refer to 7 U.S.C. § 2904(7), which prescribes through

1 the Beef Order require the Beef Board and its Operating Committee
2 to:

3 (A) maintain such books and records, which
4 shall be available to the Secretary for
inspection and audit as the Secretary may
prescribe;

5 (B) prepare and submit to the Secretary, from
6 time to time, such reports as the Secretary
may prescribe; and

7 (C) account for the receipt and disbursement
8 of all funds entrusted to them.

9 The Commission argues that Plaintiffs' attempt to
10 distinguish the control by the USDA Secretary over the Beef Board
11 bank accounts from the purported absence of control over the
12 Table Grape Commission bank accounts by the CDFA Secretary is
13 unavailing. The Commission references 7 U.S.C. § 2904(9), which
14 specifies that the Beef Order "shall provide that the Board, with
15 the approval of the Secretary, may invest, pending disbursement,
16 funds collected through assessments only in obligations of the
17 United States or any agency thereof, in general obligations of
18 any State or political subdivision thereof, in any interest-
bearing account or certificate of deposit of a bank that is a
20 member of the Federal Reserve System, or in obligations fully
21 guaranteed as to principal and interest by the United States."
22 The Commission argues that "[a]lthough the Beef Board is required
23 to obtain the Secretary of Agriculture's approval, there is no
24 indication that USDA controls the relevant bank accounts." The
25 Commission points out that Section 2904(7) merely requires the
26 Beef Board to "account for the receipt and disbursement of all

1 funds entrusted to them". Here, the Commission contends, its
2 funds are appropriated by the Legislature.

3 Whether the Commission's funds are appropriated by the
4 Legislature or derived from assessments is a contested fact;
5 however, after *Johanns* this is not material. Plaintiffs focus on
6 the absence of any prior approval or involvement by the CDFA
7 Secretary in the investment and disbursement of Commission funds,
8 as with the USDA Secretary's role over the Beef Board's funds.
9 The statute governing the Pistachio Commission, Section 69043, is
10 virtually identical to Section 65570. There is no discussion in
11 *Paramount Land Co., supra*, 491 F.3d 1003, that the statutory
12 difference between regulation of investments by the Beef Board
13 and those by the Pistachio Commission was of any importance.
14 Further, Section 65572(f) requires the Commission:

15 To keep accurate books, records and accounts
16 of all its dealings, which books, records and
17 accounts shall be open to inspection and
18 audit by the Department of Finance of the
State of California or other state officer
charged with the audit of operations of
departments of the State of California.

19 4. Pursuant to § 65571, "[t]he State of California
20 shall not be liable for the acts of the commission or its
21 contracts" and "[p]ayment of all claims arising by reason of the
22 administration of this chapter or acts of the commission shall be
23 limited to the funds collected by the commission." Plaintiffs
24 assert that the United States Department of Agriculture would be
25 liable for claims against the Beef Board.

26 The Commission responds that the State generally has

1 sovereign immunity against damages claims, absent waiver of
2 sovereign immunity. See *Country Eggs, Inc. v. Kawamura*, 129
3 Cal.App.4th 589 (2005). Further: "Plaintiffs do not explain how
4 the State's decision to permit suits against a single
5 governmental entity, but to decline to waive its sovereign
6 immunity in suits directed against the State as a whole, says
7 anything about whether the Commission is a governmental entity.
8 A state is free to define the scope of its own waiver of
9 sovereign immunity."

10 Plaintiffs cite *Country Eggs, Inc. v. Kawamura, supra*, where
11 an egg handler paid assessments mandated by the California Egg
12 Commission, Cal. Food & Ag. Code §§ 75001 - 75176, for
13 educational and promotional activities, which sought to avoid in
14 a suit seeking to invalidate the statutory provisions as
15 violative of federal constitutional rights. After a counterclaim
16 to collect delinquent assessments was filed, Plaintiff entered
17 into a stipulated order for dismissal and judgment against it and
18 agreed to continue paying the assessments. Plaintiff then filed
19 a state court action challenging the assessment scheme on state
20 constitutional grounds. Although Plaintiff obtained a judgment
21 for refund of its assessments, it was unable to collect the
22 refund because the California Egg Commission had ceased
23 operations and lacked funds to satisfy the judgment.

24 Plaintiff then sued the California Department of Agriculture
25 for declaratory and injunctive relief, alleging that the State
26 was liable for the debts of the Egg Commission because it allowed

1 the Egg Commission to go out of business without requiring it to
2 set aside sufficient funds to pay the judgment, and seeking a
3 declaration that the state immunity provision in California Food
4 & Agriculture Code § 75070, violated the due process provisions
5 of the United States and California Constitutions. Citing Cal-
6 *Almond, Inc. v. U.S. Dept. of Agriculture*, 67 F.3d 874, 877-880
7 (9th Cir.1995), the state Court of Appeals held in pertinent
8 part:

9 ... Plaintiff seeks relief not from the
10 Commission to whom it paid the assessments,
but from the State. Consequently, the remedy
sought is not a refund, but damages. But
section 75070 specifically immunizes the
State from liability for acts of the
Commission and limits payment of claims to
the funds collected by the Commission. As in
Cal-Almond, plaintiff's claim cannot succeed
in light of statutory immunity provisions.

129 Cal.App.4th at 597. The Court of Appeals then addressed
Plaintiff's argument that Section 75070 does not apply because
the Egg Commission was a state-created entity that provided a
direct benefit to the State:

Under these circumstances, plaintiff suggests, the State should be held liable for the judgment the Commission owes to plaintiff under something akin to a vicarious liability or alter ego theory. Even if these theories might be appropriate in certain situations, the factual predicate for such a claim is not present here. The Commission was an independent entity and did not provide a direct benefit to the State sufficient to warrant the imposition of liability.

Plaintiff overreaches in asserting that because the Commission was created as an entity in state government (§ 75051), defendants are necessarily liable for the

Commission's financial obligations. The fact that the Commission is a creation of the State does not mean that the State is automatically responsible for the Commission's acts any more than the State is automatically responsible for a county's acts or those of any statutorily-created entity. As one court noted in determining whether a state agency could invoke the state's Eleventh Amendment immunity, '[l]abeling an entity as a "state agency" in one context does not compel treatment of that entity as a "state agency" in all contexts.' (*Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527, 534) 'It is the relationship between the entity and the state, not the label attached to the entity, that determines whether the Eleventh Amendment would shield that entity from suit in federal court.' (*Id.* at p.536.)

A review of the statutory scheme governing the Commission demonstrates the Commission's independence from the Department. Eight of the Commission's nine members are elected by handler members. (§ 75051.) The ninth, a public member (see *id.*), is appointed by the Department director from a list of nominees recommended by the Commission. (§ 75052.) Handlers also elect three alternative members of the Commission (§ 75058.) The Commission itself elects representatives to fill any midterm vacancies. (§ 75059.)

The Commission is a corporate body with the power to sue and be sued, and to enter into contracts. (§§ 75064, 75092.) The Commission controls its own finances. Any funds the Commission receives, including assessments paid by handlers, are to be deposited into a bank account designated by the Commission, and those funds 'shall be disbursed by order of the Commission through the agent or agents that it designated for that purpose.' (§ 75069.) The Commission can incur expenses, create liabilities and borrow funds in advance of receipt of assessments. (§ 75088.) It can accept contributions for the purpose of carrying out its activities. (§ 75092.5.)

1 The Commission is empowered to adopt its
2 rules and regulations (§ 75082), and
3 administer and enforce its activities. (§
4 75083.)

5 The Department plays a narrowly circumscribed
6 role in the Commission's activities. The
7 Department director sits on the Commission,
8 but only as an ex officio member. (§ 75053.)
9 His or her authority over the Commission's
10 activities is limited to the ability to
11 'require the [C]ommission to correct or cease
12 any existing activity or function which is in
13 violation of this chapter.' (§ 75054, subd.
14 (a).) If the Commission does not comply with
15 such a directive, the director may suspend
16 all or a portion of the Commission's
17 activities. (§ 75054, subd. (b).)

18 In short, the Commission enjoys broad
19 authority, independent of the Department.
20 Given this independence, there is no basis to
21 make the State liable for the Commission's
22 activities. (Cf. *ITSI TV Productions v.*
23 *Agricultural Associations* (9th Cir. 1993) 3
24 F.3d 1289, 1292 [outlining factors for
25 determining whether a state agency is an arm
26 of the state for purposes of Eleventh Amend.
 immunity].)

Plaintiff argues that liability is proper because the State directly benefits from the Commission's activities and, as evidence of the State's interest, it points to several statements included in the statutes creating the Commission. For example, section 75001 recognizes that the 'maintenance and expansion of the market for eggs is vital to the economy of California.' Section 75003 declares it to be state policy 'to aid in the handling of eggs and egg products, to develop more efficient and equitable methods in handling, and to maintain job security for workers in the egg industry.' Similarly, section 75004 provides: 'The production of eggs and egg products in this state and the marketing of eggs and egg products in this state, regardless of their point of origin is hereby declared to be affected with a public interest. This chapter is enacted in the exercise of the police power of this state

1 for the purpose of protecting the health,
2 peace, safety, and general welfare of the
3 people of this state.'

4 These general statements do not link
5 defendants to the Commission's activities to
6 such an extent that vicarious liability is
7 constitutionally compelled. The benefits
8 flowing to the State from the Commission's
9 operations are indirect, and do not provide
10 support for declaring section 75070
11 unconstitutional as applied to this case.

129 Cal.App.4th at 597-599.

Section 69044 governing the Pistachio Commission is
virtually identical to Section 65571. There is no discussion in
Paramount Land Co., *supra*, 491 F.3d 1003, that making the
Pistachio Commission, as opposed to the State of California,
liable for claims against the Pistachio Commission was a relevant
factor in determining whether or not *Johanns* applied.

5. Pursuant to § 65600, an assessment upon all fresh
grapes shipped during each marketing season "as fixed by the
commission" shall be levied, but, during any marketing season,
the assessment shall not exceed the amount specified in § 65600.

Section 69081 governing the Pistachio Commission is
virtually identical to Section 65600.

6. Pursuant to § 65650, the Commission may bring an
action in its name to redress violations "of this chapter or any
rule or regulation." Plaintiffs contend that the California
Department of Food and Agriculture may not do so.

The Pistachio Commission also is accorded the right "to
commence civil actions and utilize all remedies provided in law

1 or equity for the collection of assessments and civil penalties,
2 and for the obtaining of injunctive relief or specific
3 performance, respecting this chapter and the rules and
4 regulations adopted under this chapter."

5 7. Pursuant to § 65650.5, any person aggrieved by any
6 action of the Commission may appeal to the Secretary of Food and
7 Agriculture, who shall review the record of the proceedings
8 before the Commission and either dismiss the appeal or reverse
9 the action of the Commission. "Any such decision of the director
10 [sic] is subject to judicial review upon petition of the
11 commission or any party aggrieved by the decision."⁴

12 Plaintiffs emphasize that this provision allows the
13 Commission to sue the Secretary.

14 The statutory provisions governing the Pistachio Commission
15 include Section 69062:

16 The commission shall adopt procedures for the
17 purpose of according individuals aggrieved by
18 its actions or determinations an informal
19 hearing before the commission or before a
20 committee of the commission designated for
that purpose. Appeals from decisions of the
commission may be made to the secretary. The
determination of the secretary shall be
subject to judicial review upon petition
filed with the appropriate court.

21 The Pistachio Commission theoretically can sue the Secretary as,
22 theoretically, can the Table Grape Commission. Nothing in
23

24 ⁴The Secretary of Food and Agriculture was formerly known as
25 the "director". Cal.Food & Ag.Code § 50 provides that the term
"director" means the Secretary of Food and Agriculture. See
26 Cal.Jur.3rd, Agriculture, § 4.

1 Paramount indicates that this possibility is of any relevance to
2 "effective control" within the meaning of *Johanns*. Moreover, no
3 waiver of sovereign immunity can be found, except if the
4 legislature has clearly and unequivocally so provided.

5 8. Plaintiffs assert that there is no provision in the
6 Ketchum Act for the Secretary to oversee, review, or
7 approve/disapprove any of the Commission's activities.

8 This is the biggest area of difference from the statutes
9 governing the Pistachio Commission. Section 69051, which
10 describes the powers and duties of the Pistachio Commission,
11 provides that annual books and records be subject to an annual
12 audit by an auditing firm selected by the Pistachio Commission
13 "with the concurrence of the secretary", that the audit be made
14 part of an annual report to all producers, "copies of which shall
15 also be submitted to the Legislature and the department", and
16 that, as the secretary deems necessary, the secretary may
17 "conduct or cause to be conducted a fiscal and compliance audit
18 of the commission", § 69051(h); that the annual budget "shall be
19 concurred in by the secretary prior to disbursement of funds",
20 except for disbursements made to pay employees of the Pistachio
21 Commission, § 69051(p); and "[t]o submit to the secretary, for
22 his or her concurrence, an annual statement of contemplated
23 activities authorized under this chapter, including advertising,
24 promotion, marketing research, and production research," §
25 69051(g). In addition, Section 69041 provides that "[t]he
26 secretary or the secretary's representatives shall be notified

1 and may attend each meeting of the commission, and any committee
2 meeting of the commission." Sections 69032 and 69033 grant the
3 Secretary authority to correct Pistachio Commission acts deemed
4 by the Secretary not to be in the public interest or in violation
5 of the chapter and to enforce that determination by legal action.

6 There is nothing in the statutes governing the Table Grape
7 Commission mirroring this type of oversight. However, Section
8 65650.5 provides for appeal to and review by the Secretary of any
9 action by the Commission and subsequent judicial review, and
10 Section 65572(f) provides for a State audit of the Commission's
11 books and records. The Stipulated Undisputed Facts establish
12 that the CDFA reviews any complaint to it about a Commission
13 advertisement and can request that the Commission provide the
14 CDFA with notices of meetings, minutes, contracts and copies of
15 advertisements.

16 9. Plaintiffs focus on the following distinction in
17 Table Grape Commission authority:

18 a. No one from the Department of Food and
19 Agriculture is notified of Commission meetings, attends
20 Commission meetings, or receives and/or approves minutes of
21 Commission meetings;

22 b. No one from the Department of Food and
23 Agriculture is notified of or approves the Commission's
24 assessment rate, the Commission's budget, staff salaries,
25 contracts, research projects, export marketing and promotions;

26 c. The Department of Food and Agriculture does

1 not review or approve Commission advertising, promotion, research
2 of marketing plans, advertising copy, does not audit the
3 Commission and does not approve the Commission's expenditures.

4 d. Pursuant to § 65550, members of the Commission
5 are appointed by the Secretary from nominees selected as provided
6 by elections set forth in § 65556 and one public member is
7 appointed pursuant to § 65575.1. Plaintiffs, however, reference
8 evidence that the Secretary has always appointed as Commission
9 members those who received the most votes from the producers who
10 voted.

11 Plaintiffs' contention does not undermine the fact that
12 members of the Commission are appointed by the Secretary and that
13 the Secretary has the authority to select those members.

14 e. Neither the Department of Food and Agriculture
15 or any other state agency is involved in or reviews Commission
16 decisions on expenditures and programs.

17 Plaintiffs' contention is incorrect. Section 65572(f)
18 provides for a State audit of the Commission's books and records.

19 f. Plaintiffs next cite their request to the
20 Department of Food and Agriculture to provide all documents in
21 its possession from January 1, 2000 to December 13, 2005
22 "relating to CDFA approval, disapproval, comment, criticism or
23 any other discussion or mention of the California Table Grape
24 Commission's advertisements, promotions, marketing, public
25 relations, press releases, lobbying activities, governmental
26 relation activities or proposed drafts of all of the same, and

1 any and all documents in CDFA's possession relating to CDFA's
2 approval, disapproval, comment, criticism or any other discussion
3 or mention of the Commission's budget, expense reports, travel
4 authorization or any other Commission expenditures."

5 The Department of Food and Agriculture responded "by stating
6 that it possessed a document relating to possible legislative
7 action, which CDFA considered exempt from the request, and the
8 department possessed bills submitted to the Commission for
9 payment of services rendered by the Marketing Branch to the
10 Commission." No other documents responsive to the request were
11 produced.

12 Relying on these alleged distinctions, Plaintiffs argue that
13 "[f]or the Commission to claim that CDFA provides 'effective
14 control' over the Commission's activities is to distort *Johanns*
15 beyond recognition, and to trivialize the legislature's obvious
16 intent to provide the Commission with virtual unlimited autonomy
17 not subject to CDFA control or review."

18 The Commission responds that, although *Johanns* discussed the
19 extensive oversight by the USDA of the beef program, nothing in
20 the decision requires such a level of involvement for an
21 agricultural entity's published messages to be "government
22 speech." Because the Ketchum Act provides that the Secretary of
23 the CDFA appoints and can remove all members of the Commission,
24 because the CDFA can reverse an action of the Commission that it
25 determines to be contrary to law or an abuse of discretion, and
26 because the State audits the Commission's books and records, the

1 CDFA retains "effective control" over the Commission and, under
2 *Johanns*, nothing more is required. The Commission argues that
3 *Johanns* "as well as the Court's other case law and general
4 constitutional principles ... indicate that where the government
5 has 'set out the overarching message,' and has established a
6 regulatory framework that makes the speaking entity 'answerable'
7 to a politically accountable official, the resulting speech is
8 government speech regardless of whether the government
9 micromanages the dissemination of the message."

10 The Commission suggests the *Johanns* decision rejected the
11 argument that the beef program did not qualify as government
12 speech because it is funded by assessments rather than the
13 general revenue. The Supreme Court distinguished those cases,
14 pointing out that government speech is subject to democratic
15 accountability: "[T]he beef advertisements are subject to
16 political safeguards more than adequate to set them apart from
17 private messages", 544 U.S. at 563. The Commission asserts that
18 the reference to "more than adequate" safeguards "made clear its
19 decision should not be understood to establish a blueprint that
20 Congress or a state legislature must follow in every case to
21 convey a 'government message.'"

22 Citing *Southworth*, *supra*, 529 U.S. at 235, that "[w]hen the
23 government speaks, for instance to promote its own policies or to
24 advance a particular idea, it is, in the end, accountable to the
25 electorate and the political processes for its advocacy", the
26 Commission argues that this rationale also applies where the

1 government uses a private entity to disseminate its message:

2 If the government has the power to stop the
3 private entity from promulgating a particular
4 message or to cause the private entity to
5 change its message, the government will
6 ultimately be held accountable for that
7 message if the voters disapprove. If, for
8 example, the Commission were to run profane
9 or indecent advertising, the Secretary of the
10 CDFA and the Governor would be hardpressed to
11 explain to Californians why they did not stop
12 it ... Plaintiffs themselves acknowledge the
13 political accountability in the California
14 government for the Commission's activities
15 when they note that the level of CDFA
16 oversight depends more on the Administration
17 in power in Sacramento than any other factor.

18 The Commission also cites *Rust v. Sullivan*, 500 U.S. 173 (1991),
19 and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) as
20 Supreme Court precedent indicating that the government need not
21 micromanage the dissemination of messages it has crafted.
22 However, these cases do not involve the issue of "government
23 speech" and do not constitute authority for the Commission's
24 position.

25 Finally, the Commission argues that requiring prior review
26 and approval of the precise wording of all government speech
would lead to "absurd results":

27 Business-improvement districts funded by
28 mandatory contributions, for example, would
29 have to get express government approval for
30 the precise wording of promotional flyers
31 they post in the downtown business district.
32 If the government were to hire a private
33 consultant to develop and run an ad campaign
34 within certain defined parameters, the
35 advertisements would fail to constitute
36 government speech simply because a government
37 official did not review and approve the
38 precise wording of the ads. Indeed, an

1 advertisement prepared by a low-level
2 government official without any consultation
3 with his supervisor would constitute
4 government speech, while the same
5 advertisement prepared by a consultant
6 executing instructions from a cabinet
7 secretary would be private speech if the
8 secretary chose not to look at the final
9 wording of the ads. It is untenable to
10 conclude that the First Amendment prescribes
11 a precise and narrowly defined set of
12 bureaucratic procedures whenever the
13 government uses private speakers to transmit
14 government messages. Imposing such a
15 requirement of micromanagement is surely not
16 what the Supreme Court had in mind when it
17 placed such emphasis in [*Johanns*] on the fact
18 that the private entity disseminating the
19 government's message must be 'answerable' to
20 a politically accountable official and when
21 it noted that the Beef Board's overall set of
22 safeguards was 'more than adequate.'

23 Plaintiffs respond that the Commission's argument that
24 *Johanns* does not require the same degree of micromanagement
25 before a finding of government speech may be found is "grasping
26 at straws":

27 [A]pparently *Johanns* did not think it would
28 lead to absurd results because that's what it
29 required when funding comes from a targeted
30 designated class (as opposed to general
31 taxpayer revenue) with respect to the Beef
32 Board. It required mandatory micro-managing
33 of the precise wording for the government to
34 be able to hang its hat on 'government
35 speech'. It would obviously be different if
36 the State simply dinged all tax paying
37 citizens to fund whatever message the elected
38 official of government wanted to carry out,
39 being responsible for that message when they
40 come up for reelection. Neither the
41 producers nor the citizens get to vote for
42 the Secretary of Agriculture, nor the Branch
43 Chief of the Secretary of Agriculture;
44 general taxpayer funds are not being used but
45 instead the targeted hit is on table grape
46 producers. Obviously, in that situation the

1 U.S. Supreme Court in *Johanns* required such
2 micro-management by a defined government
3 agency, USDA, and the Secretary of USDA. It
4 is simply remarkably disingenuous for the
Commission to argue that the U.S. Supreme
Court in-depth recitation of the Secretary's
control over the Beef Board and the message
was simply pontificating dicta.

5 *Johanns* addressed the degree of effective control without
6 defining conditions that constitute the required degree of
7 control before "government speech" in a compelled subsidy case is
8 established. In *Johanns*, the Supreme Court described the facts
9 before it, from which it found that control "more than adequate."
10 The inquiry does focus on the extent of the CDFA's control over
11 the Commission. Plaintiffs seek a rule that unless every
12 procedure/requirement present in *Johanns* is here present, there
13 is no "government speech." In *Paramount Land Co., supra*, 491
14 F.3d at 1012, the Ninth Circuit cautioned:

15 We acknowledge that there are differences in
16 actual oversight between the beef scheme and
the pistachio scheme, but these factual
17 differences are legally insufficient to
justify the injunction. To draw a line
18 between these two approaches to oversight
risks micro-managing legislative and
19 regulatory schemes, a task federal courts are
ill-equipped to undertake. 'The message set
20 out in the [pistachio] promotions is from
beginning to end the message established' by
21 the state government.

22 The statutory provisions governing the Commission, coupled with
23 the Stipulated Undisputed Facts, demonstrate as a matter of law
24 the CDFA has the effective control over the Commission required
25 by *Johanns*.

26 Plaintiffs' motion for partial summary judgment on the issue

1 of effective control within the meaning of *Johanns* is DENIED; the
2 Commission's motion for summary judgment on this issue is
3 GRANTED.

4

5

6 G. APPLICABILITY OF CENTRAL HUDSON TEST.

7 Assuming arguendo that *Johanns* does not apply, the
8 Commission's motion for summary judgment on the application of
9 the *Central Hudson* test is addressed.

10 The Commission moves for summary judgment that the Ketchum
11 Act is constitutional under the test described in *Central Hudson*
12 *Gas & Electric Corp. v. Public Service Commission of New York*,
13 447 U.S. 557 (1980), which the Commission characterizes as
14 "intermediate scrutiny". Plaintiffs move for summary
15 adjudication that the *Central Hudson* test is not applicable in
16 determining the constitutionality of the Ketchum Act under the
17 First Amendment.

18 In *Central Hudson*, the Supreme Court discussed First
19 Amendment restrictions on commercial speech, i.e., "expression
20 related solely to the economic interests of the speaker and its
21 audience." 447 U.S. at 561. Under *Central Hudson*, restrictions
22 on lawful, non-misleading commercial speech are evaluated under a
23 three-part test. First, the asserted government interest behind
24 the restrictions must be substantial. Second, the restrictions
25 must directly advance that interest. Third, the program must not
26 be more extensive than necessary to serve that interest. *Id.*, at

1 566.

2 The Ninth Circuit's *Wileman Bros. & Elliott, Inc. v. Espy*,
3 58 F.3d 1367 (9th Cir.1995), opinion analyzed the First Amendment
4 challenge to the generic advertising program assessments
5 promulgated the federal Marketing Order under the AMAA for
6 nectarines, peaches and plums under the *Central Hudson* test and
7 concluded that the program violated the First Amendment. In
8 reversing the Ninth Circuit, the Supreme Court held in *Glickman*
9 *v. Wileman Brothers & Elliott, supra*, 521 U.S. 457, that it was
10 error for the Ninth Circuit to rely on *Central Hudson* for the
11 purpose of testing the constitutionality of marketing order
12 assessments for promotional advertising:

13 The Court of Appeals fails to explain why the
14 *Central Hudson* test, which involved a
15 restriction on commercial speech, should
16 govern a case involving the compelled funding
17 of speech. Given the fact that the Court of
18 Appeals relied on *Abood* for the proposition
19 that the program implicates the First
20 Amendment, it is difficult to understand why
21 the Court of Appeals did not apply *Abood*'s
22 'germaneness' test.'

23 *Id.*, at 474 n.18. The Supreme Court held that application of the
24 *Central Hudson* test "is inconsistent with the very nature and
25 purpose of the collective action program at issue here":

26 The Court of Appeals concluded that the
27 advertising program does not 'directly
28 advance' the purposes of the marketing orders
29 because the Secretary had failed to prove
30 that generic advertising is any more
31 effective in stimulating consumer demand for
32 the commodities than the advertising that
33 might otherwise be undertaken by producers
34 acting independently. We find this an odd
35 burden of proof to assign to the

1 administration of marketing orders that
2 reflect a policy of displacing unrestrained
3 competition with Government supervised
4 cooperative marketing programs. If there
5 were no marketing orders at all to set
6 maturity levels, size, quantity, and other
7 features, competition might well generate
8 greater production of nectarines, peaches,
9 and plums. It may also be true that if there
10 were no generic advertising, competition
11 would generate even more advertising and an
12 even larger consumer demand than does the
13 cooperative program. But the potential
14 benefits of individual advertising do not
15 bear on the question whether generic
16 advertising directly advances the statute's
17 collectivist goals. Independent advertising
18 would be primarily motivated by the
19 individual competitor's interest in
20 maximizing its own sales, rather than in
21 increasing the overall consumption of a
22 particular commodity. While the First
23 Amendment unquestionably protects the
24 individual producer's right to advertise its
25 own brands, the statute is designed to
26 further the economic interests of the
producers as a group. The basic policy
decision that underlies the entire statute
rests on an assumption that in the volatile
markets for agricultural commodities the
public will be best served by compelling
cooperation among producers in making
economic decisions that would be made
independently in a free market. It is
illogical, therefore, to criticize any
cooperative program authorized by this
statute on the ground that competition would
provide greater benefits than joint action.

20 *Id.* at 475.

21 The Commission argues that the Supreme Court in *Glickman*
22 only reversed the Ninth Circuit because it concluded, under the
23 circumstances of that case, that the *Central Hudson* analysis was
24 too demanding because the generic advertising program did not
25 implicate the First Amendment and, to the extent that it did, it
26

1 was constitutional under the *Abood* germaneness test. In a case
2 where the First Amendment is implicated, the Commission argues,
3 there is no reason to think that the Ninth Circuit will deviate
4 from its original conclusion in *Wileman Bros.* that a program is
5 constitutional if it passes intermediate scrutiny under *Central*
6 *Hudson*. The Commission opines that the Supreme Court's *United*
7 *Foods* decision, *supra*, 533 U.S. 405, is not to the contrary
8 because the *Central Hudson* test was not argued by the United
9 States and was not before the Court. The Commission points to
10 the California Supreme Court's application of the *Central Hudson*
11 test to a First Amendment challenge under the California
12 Constitution to the California Plum Marketing Program issued by
13 the Secretary of Food and Agriculture pursuant to the California
14 Marketing Act of 1937. See *Gerawan Farming, Inc. v. Kawamura*, 33
15 Cal.4th 1 (2004):

16 4. *The Proper State Constitutional Test*

17 As noted, the court in *Glickman* held that if
18 the First Amendment had been implicated, then
19 the 'test' of *Abood* and *Keller* would 'clearly
[be] satisfied in this case because ... the
generic advertising ... is unquestionably
germane to the purposes of the marketing
order[] ... (*Glickman*, *supra*, 521 U.S. at p.
473). As has been recognized, the standard
employed by the *Glickman* court was 'plainly
less exacting' than the intermediate scrutiny
test employed in testing the
constitutionality of commercial speech
restrictions. (*Gerawan I*, *supra*, 24 Cal.4th
at pp. 534-535 (dis. opn. of George C., J.)
In light of our recognition in *Gerawan I* that
the generic advertising program does in fact
implicate the free speech clause, that is to
say, a program of compelled subsidization of
generic advertising does interfere with the

1 right protected under the free speech clause
2 and requires some justification for that
3 interference, we believe it would be
incongruous to subject the program to only
minimal scrutiny.

4 On this point, we are partly persuaded by
5 Justice Souter's dissent in *Glickman, supra*,
6 521 U.S. at page 477, wherein he points out
7 that previous forays into compelled funding
of speech have involved areas in which the
importance of the government interest at
stake and legitimacy of compelled association
was already well established. Commenting on
8 the seminal case of *Abood, supra*, 431 U.S.
9 209, Justice Souter reasoned that the court
had concluded some interference with the
First Amendment interests was
10 "'constitutionally justified by the
legislative assessment of the important
contribution of the union shop to the system
of labor relations established by Congress."
11 [Citation]; see also *Keller, supra*, [496 U.S.
12 at pp.] 13-14 ("[T]he State's interest in
regulating the legal profession and improving
13 the quality of legal services" justifies "the
compelled association [inherent in the]
integrated bar"). But this was simply a way
14 of saying that the government's objective of
guaranteeing the opportunity for a union
shop, the importance and legitimacy of which
15 were already settled, [citations], could not
be attained without the incidental
infringements of the interests in unfettered
16 speech and association that petitioners there
claimed.' (*Glickman, supra*, 521 U.S. at p.
17 484 (dis. opn. of Souter, J.).)

18 Justice Souter appears correct that an
assumption underlying *Abood* and *Keller*,
19 albeit an implicit one, is that the interest
20 justifying the compelled association must be
important, and that there be no effective
21 alternative means of achieving this interest
with less intrusion on free speech rights.
22 On the other hand, the conclusion of the
23 *Glickman* majority that the compelled funding
of generic advertising requires only minimal
scrutiny is at variance with the general rule
24 that intrusion into free speech rights
25 requires substantial justification, even when
26

1 the intrusion is incidental to the
2 enforcement of a content-neutral law. (See
3 *O'Brien v. United States* (1968) 391 U.S. 367
4 ... The requirement of substantial
5 justification is further supported by the
6 fact that the right of free speech under the
7 California Constitution is in some respects
8 "broader" and "greater" than under the
9 First Amendment. (*Gerawan I, supra*, 24
10 Cal.4th at p.491, and cases cited therein.)
11

12 Because generic advertising was not self-
13 evidently incidental to the functioning of
14 some important, legislatively established
15 institution, such as a union shop or an
16 integrated state bar as in *Abood* and *Keller*,
17 Justice Souter argued for treating compelled
18 funding of such advertising the same as any
other regulation implicating the right of
commercial speech, subjecting it to the test
articulated in *Central Hudson* ... We believe
this intermediate standard appropriately
protects the free speech rights article I was
designed to safeguard. Drawing on
constitutional doctrine summarized above, we
conclude that the compelled funding of
commercial speech neither warrants
application of the strictest scrutiny
reserved for such matters as the censorship
or compelled utterance of noncommercial
speech (see, e.g., *Texas v. Johnson* (1989)
491 U.S. 397, 412 ...; *West Virginia Bd. of
Ed. v. Barnett* (1943) 319 U.S. 624, 642 ...,
nor can it pass muster simply because it is
rationally based.

19 33 Cal.4th at 20-22.

20 Plaintiffs argue that the Commission is "clearly wrong"
21 because the Supreme Court has never applied the *Central Hudson*
22 test for commercial speech restrictions in a case involving
23 compelled subsidies. While the Ninth Circuit utilized the
24 *Central Hudson* test in *Wileman Bros.*, Plaintiffs note that it did
25 so before *United Foods* was decided by the Supreme Court. Since
26 *United Foods*, Plaintiffs contend, the Ninth Circuit followed

1 *United Foods in Delano Farms Co. v. California Table Grape*
2 *Com'n.*, *supra*, 318 F.3d 895. Plaintiffs assert that the Supreme
3 Court "applied the directly relevant line of authority, namely,
4 *Abood/Keller/United Foods* line of cases addressing compelled
5 subsidies of speech." Plaintiffs further assert that cases since
6 *United Foods* have refused to apply the *Central Hudson* test.

7 Plaintiffs cite *In re Washington State Apple Advertising*
8 *Commission*, 257 F.Supp.2d 1290 (E.D.Wash.2003), where the
9 District Court rejected the argument that the *Central Hudson* test
10 applied:

11 While advertising fits the classical
12 definition of commercial speech in that it
13 does no more than propose a commercial
14 transaction, *Central Hudson*, 447 U.S. at 562
15 ..., the Commission's mandatory assessments
16 are not a restriction upon the commercial
17 speech of the Defendants like a restriction
18 on their ability to advertise would be.
19 Rather, the objecting apple producers are
20 compelled to pay for commercial speech.
21 Although *United Foods* did not clearly reject
22 application of the *Central Hudson* test, it
23 did refuse to consider the first prong of
24 that test:

25 We need not enter into that
26 controversy, for even viewing
27 commercial speech as entitled to
28 lesser protection, we find no basis
29 under either *Glickman* or our other
30 precedents to sustain the compelled
31 assessments sought in this case ...
32 the Government itself does not rely
33 upon *Central Hudson* to challenge
34 the Court of Appeals' decision ...,
35 and we therefore do not consider
36 whether the Government's interest
37 could be considered substantial for
38 purposes of the *Central Hudson*
39 test.

1 *United Foods*, 121 S.Ct. at 2337-38. The
2 Court concludes that *United Foods*, by
3 refraining from deciding the first prong of
4 *Central Hudson*, deemed the commercial speech
5 test inapplicable. *Central Hudson's* test,
6 which requires that the restriction on speech
7 not be 'more extensive than necessary' to
8 serve the interest, 447 U.S. at 566 . . .,
9 presupposes a restriction on speech. Here,
the Defendants' speech is not being
restricted, instead it is being compelled.
Because the Commission's assessments do not
restrict speech, it is inappropriate to apply
the *Central Hudson* test for restrictions on
speech. See also *Glickman*, 521 U.S. at 474
n.18 . . . (reversing the Ninth Circuit's
decision to apply *Central Hudson*).

10 At argument on these motions, the Commission
11 argued that *United Foods* cited a compelled
12 speech case, *Zauderer v. Office of*
Disciplinary Counsel, 471 U.S. 626 . . .
13 (1985), which applied the *Central Hudson*
14 test, undermining this Court's conclusion not
to apply *Central Hudson* at all. *Zauderer*
upheld the requirement that an attorney, who
chose to advertise, include certain
disclosures in that advertising. *Id.* at 650-
52. *Zauderer* reasoned that because the
government is free to regulate commercial
speech to prevent it from being false,
deceptive or misleading, *id.* at 638 . . ., it
can compel speech to ensure those ends as
well, *id.* at 652 . . . Because the rationale
for regulation there, to prevent false and
misleading commercial speech, does not apply
to the compelled funding of commercial speech
here, *Zauderer* is inapplicable to this case.
See also *United Foods*, 533 U.S. at 416 . . .
(holding that *Zauderer* was inapposite because
there was no suggestion that the mandatory
assessments were necessary to prevent
voluntary advertising from being misleading).

23 257 F.Supp.2d at 1303-1304.

24 Plaintiffs cite *Michigan Pork Producer's Association, Inc.*
25 *v. Veneman*, 348 F.3d 157, 163 (6th Cir.2003), reversed and
26 remanded for further consideration in light of *Johanns v.*

1 *Livestock Marketing Association*, 544 U.S. 1058 (2005), remanded
2 to District Court:

3 [W]e find inapplicable to this case the
4 relaxed scrutiny of commercial speech
5 analysis provided for by *Central Hudson* and
6 relied upon by Appellants. The Pork Act does
7 not directly limit the ability of pork
8 producers to express a message; it compels
9 them to express a message with which they do
10 not agree. Even assuming that the
11 advertising funded by the Act is indeed
12 commercial speech, the more lenient standard
13 of review applied to limits on commercial
speech has never been applied to speech -
commercial or otherwise - that is compelled.
See *Glickman*, 521 U.S. at 474 n.18
(questioning whether 'the *Central Hudson*
test, which involved restrictions on
commercial speech, should govern a case
involving the compelled funding of speech').
It is one thing to force someone to close her
mouth; it is quite another to force her to
become a mouthpiece.

14 In *Cochran v. Veneman*, 359 F.3d 263, 276-280 (3rd Cir.2004),
15 judgment reversed and remanded for further consideration in light
16 of *Johanns v. Livestock Marketing Association*, 544 U.S. 1058
17 (2005), also cited by Plaintiffs, the Third Circuit, after
18 discussion of *Central Hudson* and *Abood*, applied the germaneness
19 test of *Abood* rather than the *Central Hudson* test. In *Pelts &*
20 *Skins, LLC v. Landreneau*, 365 F.3d 423, 434 n.21 (5th Cir.2004),
21 judgment reversed and remanded for further consideration in light
22 of *Johanns v. Livestock Marketing Association*, 544 U.S. 1058
23 (2005), remanded to District Court, 448 F.3d 743 (5th Cir.2006),
24 the Fifth Circuit doubted that the *Central Hudson* test applied
25 but choose to leave the question open because even if the *Central*
26 *Hudson* test were applied, Louisiana's alligator marketing program

1 would not pass it.

2 These Circuit Court opinions are no longer valid authority;
3 all were reversed and remanded by the Supreme Court based on
4 *Johanns*. Following the Supreme Court's reversal and remand, the
5 Third Circuit in *Cochran v. Veneman* entered an Order affirming
6 the judgment of the District Court for the Middle District of
7 Pennsylvania, 252 F.Supp.2d 126 (M.D.Pa.2003), which the Third
8 Circuit had previously reversed; upon remand by the Fifth Circuit
9 to the District Court in *Pelts & Skins*, the District Court
10 granted a Consent Motion to Dismiss All Claims Without Prejudice
11 and did not affirmatively consider the impact of *Johanns* on the
12 case; upon remand by the Sixth Circuit in *Michigan Pork
Producers*, the District Court entered a Stipulation for Dismissal
13 and did not affirmatively consider the impact of *Johanns* on the
14 case.⁵

15
16 The Commission's assertion that *Glickman* rejected the
17 *Central Hudson* test as "too demanding" finds no support in
18 *Glickman*'s majority opinion. It appears that the Commission
19 bases this interpretation on the California Supreme Court's
20 reliance in *Gerawan*, *id.*, 33 Cal.4th at 20-22, on Justice
21 Souter's dissenting opinion. The majority opinion in *Glickman*
22 clearly questioned the application of *Central Hudson* to First

23
24 _____
25 ⁵The Court may take judicial notice of matters of public
26 record, including duly recorded documents, and court records
available to the public through the PACER system via the internet.
See Fed. R. Evid. Rule 201(b); *United States v. Howard*, 381 F.3d
873, 876, fn.1 (9th Cir. 2004).

1 Amendment challenges in compelled subsidy cases and held that the
2 Ninth Circuit erred in relying on *Central Hudson*. That the
3 California Supreme Court reached a different conclusion relying
4 on a dissenting opinion does not change the law and is not
5 binding on a federal district court addressing the First
6 Amendment to the United States Constitution. The Commission's
7 assertion that the Ninth Circuit will continue to apply *Central*
8 *Hudson* is speculation unsupported by any case authority since
9 *Glickman*, other than the California Supreme Court's *Gerawan*
10 decision.

11 The Commission contends that *Central Hudson* intermediate
12 scrutiny is appropriate because the Ketchum Act only requires
13 funding of commercial speech and the Ketchum Act satisfies the
14 *Central Hudson* test. The cases discussed above support the view
15 that *Central Hudson* simply does not apply.

16 Plaintiffs' motion for summary judgment that the *Central*
17 *Hudson* test is not applicable in determining the
18 constitutionality of the Ketchum Act as it relates to the Table
19 Grape Commission is GRANTED and the Commission's motion that the
20 Ketchum Act is constitutional under the *Central Hudson* test is
21 DENIED. The *Central Hudson* test does not apply.

22 H. WHETHER GLICKMAN OR UNITED FOODS APPLIES.

23 If *Johanns* does not apply, Plaintiffs move for summary
24 adjudication that the Supreme Court's ruling in *United States v.*
25 *United Foods, Inc.*, *supra*, 533 U.S. 405, rather than the ruling
26 in *Glickman v. Wileman Brothers & Elliott*, *supra*, 521 U.S. 457,

1 governs the Ketchum Act. Plaintiffs contend that the Ninth
2 Circuit's *Delano Farms v. California Table Grape Commission*,
3 *supra*, 318 F.3d 895 (9th Cir.2003), ruling is "law of the case"
4 and that the undisputed facts in this action demonstrate that
5 *United Foods* controls.

6 1. Glickman v. Wileman Brothers & Elliott.

7 In *Glickman v. Wileman Brothers & Elliott*, *supra*, 521 U.S.
8 457 (1997), California tree-fruit growers, handlers and
9 processors initiated administrative proceedings challenging the
10 validity of various regulations contained in marketing orders
11 promulgated by the United States Secretary of Agriculture under
12 the Agricultural Marketing Act of 1937 (AMAA). The disputed
13 orders assessed respondents for, *inter alia*, the cost of generic
14 advertising of California nectarines, plums and peaches. After
15 the Department of Agriculture upheld the generic advertising
16 regulations, respondents sought judicial review. The district
17 court found the orders lawful. The Ninth Circuit, relying on
18 *Central Hudson*, *supra*, 447 U.S. 557, held that the Government
19 enforced contributions to pay for generic advertising violated
20 respondents' commercial speech rights. See *Wileman Bros. &*
21 *Elliott, Inc. v. Espy*, *supra*, 58 F.3d 1367. The question
22 presented to the Supreme Court was "whether the requirement that
23 respondents finance such generic advertising is a law 'abridging
24 the freedom of speech' within the meaning of the First
25 Amendment." 521 U.S. at 460-461. The Supreme Court discussed
26 the Ninth Circuit's conclusion that Government enforced

1 contributions to pay for generic advertising violated the First
2 Amendment rights of the handlers:

3 Relying on an earlier Ninth Circuit decision
4 that had cited our decision in *Abood v.*
5 *Detroit Bd. of Ed.*, 431 U.S. 209 (1977), see
6 *Cal-Almond, Inc. v. United States Dept. of*
7 *Agriculture*, 14 F.3d 429 (CA9 1993), the
8 court began by stating that the 'First
9 Amendment right of freedom of speech includes
10 a right not to be compelled to render
11 financial support for others' speech.' 58
12 F.3d at 1377. It then reviewed the generic
13 advertising regulations under 'the test for
14 restrictions on commercial speech set out in
15 *Central Hudson Gas & Electric Corp.* ... *Id.*
16 at 1378. Although it was satisfied that the
17 Government interest in enhancing returns to
peach and nectarine growers was substantial,
it was not persuaded that generic advertising
passed either the second or third 'prongs' of
Central Hudson. With respect to the former,
even though the generic advertising
'undoubtedly' has increased peach and
nectarine sales, the Government failed to
prove that it did so more effectively than
individualized advertising. The court also
concluded that the program was not 'narrowly
tailored' because it did not give the
handlers any credit for their own advertising
and because California was the only state in
which such programs were in place.

18 521 U.S. at 465-466. The Supreme Court left undisturbed
19 respondents' content-based challenge to the constitutionality of
20 the generic advertising program, arising from their claimed
21 disagreement with the content of some of the generic advertising.
22 The Ninth Circuit did not rely on this claim in invalidating the
23 advertising program; rather the generic advertising program was
24 struck down "on the theory that the program could not survive
25 *Central Hudson* because the Government had failed to prove that
26 generic advertising was more effective than individual

1 advertising in increasing consumer demand for California
2 nectarines, plums, and peaches." *Id.* at 467. The Supreme Court
3 reasoned that the Ninth Circuit's "holding did not depend at all
4 on either the content of the advertising, or on the respondents'
5 claimed disagreement with any particular message" and that
6 respondents' arguments about their disagreement with particular
7 messages, "while perhaps calling into question the administration
8 of portions of the program, have no bearing on the validity of
9 the entire program." *Id.* at 467-468. The Supreme Court then
10 stated:

11 For purposes of our analysis, we neither
12 accept nor reject the factual assumption
13 underlying the Court of Appeals' invalidation
14 of the program - namely, that generic
15 advertising may not be the most effective
16 method of promoting the sale of these
commodities. The legal question that we
address is whether being compelled to fund
this advertising raises a First Amendment
issue for us to resolve, or rather is simply
a question of economic policy for Congress
and the Executive to resolve.
17

18 In answering that question we stress the
importance of the statutory context in which
it arises. California nectarines and peaches
are marketed pursuant to detailed marketing
orders that have displaced many aspects of
independent business activity that
characterize other portions of the economy in
which competition is fully protected by the
antitrust laws. The business entities that
are compelled to fund the generic advertising
at issue in this litigation do so as a part
of a broader collective enterprise in which
their freedom to act independently is already
constrained by the regulatory scheme. It is
in this context that we consider whether we
should review the assessments used to fund
collective advertising, together with other
collective activities, under the standard
26

1 appropriate for the review of economic
2 regulation or under a heightened standard
3 appropriate for the review of First Amendment
4 issues.

5 *Id.* at 468-469. The Supreme Court held that three
6 characteristics of the generic advertising program mandated by
7 the marketing orders distinguished it from laws that have been
8 found to abridge the freedom of speech protected by the First
9 Amendment: "First, the marketing orders impose no restraint on
10 the freedom of any producer to communicate any message to any
11 audience. Second, they do not compel any person to engage in any
12 actual or symbolic speech. Third, they do not compel the
13 producers to endorse or to finance any political or ideological
14 views." *Id.* at 460-470. The Supreme Court found the fact the
15 marketing orders imposed no restraint on the freedom of any
16 producer to communicate any message to any audience,
17 "distinguishes the limits on commercial speech at issue in
18 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*,
19 447 U.S. 557 (1980), *Virginia Bd. of Pharmacy v. Virginia*
20 *Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *44*
21 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)." *Id.* at
22 469 n.12.

23 The Supreme Court rejected the argument that the assessments
24 for generic advertising impinge on First Amendment rights because
25 they reduce the amount of money the producers have to conduct
26 their own advertising, holding that "[t]he fact that an economic
 regulation may indirectly lead to a reduction in a handler's

1 individual advertising budget does not itself amount to a
2 restriction on speech." *Id.* at 470. The Supreme Court noted
3 that the Ninth Circuit had accepted the argument that the
4 assessments infringe First Amendment rights because they
5 constitute compelled speech, *id.* at 470, but reversed by finding
6 the assessments do not constitute compelled speech in violation
7 of the First Amendment because "[t]he use of the assessments to
8 pay for advertising does not require respondents to repeat an
9 objectionable message out of their own mouths, ... [or] require
10 them to use their own property to convey an antagonistic
11 ideological message ..., [or] force them to respond to a hostile
12 message when they 'would prefer to remain silent,' ... or require
13 them to be publicly identified or associated with another's
14 message ...". *Id.* at 471.

15 The Supreme Court addressed the Ninth Circuit's reliance on
16 *Abood* that the First Amendment prohibits compelling an individual
17 to contribute financial support for another's speech without
18 sufficient justification by the government:

19 ... However, *Abood*, and the cases that follow
20 it, did not announce a broad First Amendment
right not to be compelled to provide
financial support for any organization that
conducts expressive activities. Rather,
Abood merely recognized a First Amendment
interest in not being compelled to contribute
to an organization whose expressive
activities conflict with one's 'freedom of
belief.' 431 U.S. at 235. We considered, in
Abood, whether it was constitutional for the
State of Michigan to require government
employees who objected to unions or union
activities to contribute to an 'agency shop'
arrangement requiring all employees to pay
26

union dues as a condition of employment. We held that compelled contributions to support activities related to collective bargaining were 'constitutionally justified by the legislative assessment of the important contribution of the union shop' to labor relations. *Id.*, at 222. Relying on our compelled-speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the 'heart of the First Amendment[-] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.' *Id.*, 234-235; see also *id.*, at 235.

Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'

Id. at 471-472. The Supreme Court recognized cases that permit assessments to fund a lawful collective program "may sometimes be used to pay for speech over the objections of some members of the group":

Thus, in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991), while we held that the cost of certain publications that were not germane to collective-bargaining activities could not

1 be assessed against dissenting union members,
2 *id.*, at 527-528, we squarely held that it was
3 permissible to charge them for those portions
4 of 'the Teachers' Voice that concern teaching
5 and education generally, professional
6 development, unemployment, job opportunities,
7 award programs . . . , and other miscellaneous
8 matters.' *Id.*, at 529. That holding was an
9 application of the rule announced in *Abood*
10 and further refined in *Keller v. State Bar of*
11 *Cal.*, 496 U.S. 1 (1990), a case involving bar
12 association activities.
13

14 As we pointed out in *Keller*, '*Abood* held that
15 a union could not expend a dissenting
16 individual's dues for ideological activities
17 not "germane" to the purpose for which
18 compelled association was justified:
19 collective bargaining. Here, the compelled
20 association and integrated bar are justified
21 by the State's interest in regulating the
22 legal profession and improving the quality of
23 legal services. The State Bar may therefore
24 constitutionally fund activities germane to
25 those goals out of the mandatory dues of all
26 members. It may not, however, in such manner
 fund activities of an ideological nature
 which fall outside of those areas of
 activity.' *Id.*, at 13-14. This test is
 clearly satisfied in this case because (1)
 the generic advertising of California peaches
 and nectarines is unquestionably germane to
 the purposes of the marketing orders and, (2)
 in any event, the assessments are not used to
 fund ideological activities.

27 We are not persuaded that any greater weight
28 should be given to the fact that some
29 producers do not wish to foster generic
30 advertising than to the fact that many of
31 them may well object to the marketing orders
32 themselves because they might earn more money
33 in an unregulated market. Respondents'
34 criticisms of generic advertising provide no
35 basis for concluding that factually accurate
36 advertising constitutes an abridgement of
37 anybody's right to speak freely. Similar
38 criticisms might be directed at other
39 features of the regulatory orders that impose
40 restraints on competition that arguably
41 disadvantage particular producers for the

1 benefit of the entire market. Although one
2 may indeed question the wisdom of such a
3 program, its debatable features are
4 insufficient to warrant special First
5 Amendment scrutiny. It was therefore error
for the Court of Appeals to rely on *Central
Hudson* for the purpose of testing the
constitutionality of market order assessments
for promotional advertising.

6 *Id.* at 473-474. In so holding, the Supreme Court noted:

7 The Court of Appeals fails to explain why the
8 *Central Hudson* test, which involved a
restriction on commercial speech, should
govern a case involving the compelled funding
9 of speech. Given the fact that the Court of
Appeals relied on *Abood* for the proposition
10 that the program implicates the First
Amendment, it is difficult to understand why
11 the Court of Appeals did not apply *Abood's*
'germaneness' test.'

12 *Id.*, at 474 n.18. The Supreme Court held that application of the
13 *Central Hudson* test "is inconsistent with the very nature and
14 purpose of the collective action program at issue here":

15 The Court of Appeals concluded that the
16 advertising program does not 'directly
advance' the purposes of the marketing orders
17 because the Secretary had failed to prove
that generic advertising is any more
18 effective in stimulating consumer demand for
the commodities than the advertising that
19 might otherwise be undertaken by producers
acting independently. We find this an odd
20 burden of proof to assign to the
administration of marketing orders that
reflect a policy of displacing unrestrained
competition with Government supervised
21 cooperative marketing programs. If there
22 were no marketing orders at all to set
maturity levels, size, quantity, and other
23 features, competition might well generate
greater production of nectarines, peaches,
and plums. It may also be true that if there
24 were no generic advertising, competition
would generate even more advertising and an
even larger consumer demand than does the
25
26

1 cooperative program. But the potential
2 benefits of individual advertising do not
3 bear on the question whether generic
4 advertising directly advances the statute's
5 collectivist goals. Independent advertising
6 would be primarily motivated by the
7 individual competitor's interest in
8 maximizing its own sales, rather than in
9 increasing the overall consumption of a
10 particular commodity. While the First
11 Amendment unquestionably protects the
12 individual producer's right to advertise its
13 own brands, the statute is designed to
14 further the economic interests of the
15 producers as a group. The basic policy
16 decision that underlies the entire statute
17 rests on an assumption that in the volatile
18 markets for agricultural commodities the
19 public will be best served by compelling
20 cooperation among producers in making
21 economic decisions that would be made
22 independently in a free market. It is
23 illogical, therefore, to criticize any
24 cooperative program authorized by this
25 statute on the ground that competition would
26 provide greater benefits than joint action.

14 *Id.* at 475.

15 2. United States v. United Foods, Inc.

16 In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001),
17 respondent challenged assessments used primarily to fund
18 advertisements promoting mushroom sales pursuant to the Mushroom
19 Promotion, Research, Consumer Information Act, 7 U.S.C. §§ 6101
20 et seq. The Act authorizes the Secretary of Agriculture to
21 establish a Mushroom Council to pursue the statute's goals.
22 Mushroom producers and importers, as defined by the Act, submit
23 nominations from among their group to the Secretary, who then
24 designates Council membership. To fund its programs, the Act
25 allows the Mushroom Council to impose mandatory assessments upon
26

1 handlers of fresh mushrooms, which assessments can be used for
2 "projects of mushroom promotion, research, consumer information,
3 and industry information". It was undisputed that most of the
4 assessments were spent on generic advertising to promote mushroom
5 sales. The district court granted summary judgment for the
6 United States based on *Glickman*. The Sixth Circuit reversed,
7 holding that *Glickman* did not control because the mandated
8 payments were not part of a comprehensive statutory agricultural
9 marketing program. The Supreme Court affirmed the Sixth
10 Circuit's decision that *Glickman* is not controlling. In so
11 doing, the Supreme Court specified three issues that it was not
12 addressing:

13 We have used standards for determining the
14 validity of speech regulations which accord
15 less protection to commercial speech than to
16 other expressions ... That approach, in turn,
17 has been subject to some criticism ... We
18 need not enter into the controversy, for even
19 viewing commercial speech as entitled to
20 lesser protection, we find no basis under
21 either *Glickman* or our other precedents to
22 sustain the compelled assessments sought in
23 this case. It should be noted, moreover,
24 that the Government itself does not rely upon
25 *Central Hudson* to challenge the Court of
Appeals' decision ... and we therefore do not
consider whether the Government's interest
could be considered substantial for purposes
of the *Central Hudson* test. The question is
whether the government may underwrite and
sponsor speech with a certain viewpoint using
special subsidies exacted from a designated
class of persons, some of whom object to the
idea being advanced.

26 *Id.* at 409-410. The Supreme Court refused to address the
Government's contention that the advertising is government speech

1 immune from First Amendment scrutiny under *Lebron v. National*
2 *Passenger Railroad Corporation*, 513 U.S. 374 (1995) because the
3 Government had not raised this argument below. *Id.* at 416-417.
4 In affirming the Sixth Circuit, the Supreme Court noted that the
5 First Amendment may prevent the government from compelling
6 individuals to express certain views, that "First Amendment
7 concerns apply here because of the requirement that producers
8 subsidize speech with which they disagree", and that "the
9 compelled funding for the advertising must pass First Amendment
10 scrutiny." *Id.*, at 410-411. The Supreme Court distinguished
11 *Glickman* because "[t]he program sustained in *Glickman* differs
12 from the one under review in a most fundamental respect":

13 In *Glickman* the mandated assessments for
14 speech were ancillary to a more comprehensive
program restricting marketing autonomy.
15 Here, for all practical purposes, the
advertising itself, far from being ancillary,
16 is the principle object of the regulatory
scheme.

17 *Id.*, at 411-412. The Supreme Court concluded:

18 The features of the marketing scheme found
19 important in *Glickman* are not present in the
case before us ... [A]lmost all of the funds
20 collected under the mandatory assessments are
for one purpose: generic advertising. Beyond
the collection and disbursement of
21 advertising funds, there are no marketing
orders that regulate how mushrooms may be
produced and sold, no exemption from the
22 antitrust laws, and nothing preventing
individual producers from making their own
marketing decisions. As the Court of Appeals
23 recognized, there is no 'heavy regulation
through marketing orders' in the mushroom
market ... Mushroom producers are not forced
24 to associate as a group which makes
cooperative decisions. '[T]he mushroom

1 growing business ... is unregulated, except
2 for the enforcement of a regional mushroom
3 advertising program,' and 'the mushroom
market has not been collectivized, exempted
from antitrust laws, subjected to a uniform
price, or otherwise subsidized through price
supports or restrictions on supply.'

5 *Id.*, at 412-413. Although the mushroom generic advertising
6 assessment only required the individual to support speech by
7 others, the Supreme Court concluded that "the mandated support is
8 contrary to First Amendment principles set forth in cases
9 involving expression by groups which include persons who object
10 to the speech, but who, nevertheless, must remain members of the
11 group by law or necessity", citing *Abood v. Detroit Bd. of
Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of Cal.*,
12 496 U.S. 1 (1990). The Supreme Court rejected the Government's
13 argument that, despite the lack of cooperative marketing, the
14 *Abood* rule protecting against compelled speech is inapplicable:

16 ... We did say in *Glickman* that *Abood*
17 'recognized a First Amendment interest in not
being compelled to contribute to an
organization whose expressive activities
conflict with one's "freedom of belief."' 521
18 U.S., at 471 (quoting *Abood*, 431 U.S., at
235). We take further instruction, however,
19 from *Abood*'s statement that speech need not
be characterized as political before it
20 receives First Amendment protection. *Id.*, at
21 232. A proper application of the rule in
Abood requires us to invalidate the instant
22 statutory scheme. Before addressing whether
a conflict with freedom of belief exists, a
23 threshold inquiry must be whether there is
some state imposed obligation which makes
24 group membership less than voluntary; for it
is only the overriding associational purpose
25 which allows any compelled subsidy for speech
in the first place. In *Abood*, the
26 infringement upon First Amendment

1 associational rights worked by a union shop
2 arrangement was 'constitutionally justified
3 by the legislative assessment of the
4 important contribution of the union shop to
5 the system of labor relations established by
6 Congress.' *Id.*, at 222. To attain the
7 desired benefit of collective bargaining,
8 union members and nonmembers were required to
9 associate with one another, and the
10 legitimate purposes of the group were
11 furthered by the mandated association.

12 A similar situation obtained in *Keller v.*
13 *State Bar of Cal.*, ... A state-mandated,
14 integrated bar sought to ensure that 'all of
15 the lawyers who derive benefit from the
16 unique status of being among those admitted
17 to practice before the courts [were] called
18 upon to pay a fair share of the cost.' *Id.*,
19 at 12. Lawyers could be required to pay
20 moneys in support of activities that were
21 germane to the reason justifying the
22 compelled association in the first place, for
23 example, expenditures (including expenditures
24 for speech) that related to 'activities
25 connected with disciplining members of the
26 Bar or proposing ethical codes for the
 profession.' *Id.*, at 16. Those who were
 required to pay a subsidy for the speech of
 the association already were required to
 associate for other purposes, making the
 compelled contribution of moneys to pay for
 expressive activities a necessary incident of
 a larger expenditure for an otherwise proper
 goal requiring the cooperative activity. The
 central holding in *Keller*, moreover, was that
 the objecting members were not required to
 give speech subsidies for matters not germane
 to the larger regulatory purpose which
 justified the required association.

21 *Id.*, at 413-414. The Supreme Court held:

22 The statutory scheme as it relates to
23 handlers of mushrooms is concededly different
24 from the scheme in *Glickman*; here the statute
25 does not require group action, save to
26 generate the very speech to which some
 handlers object. In contrast to the program
 upheld in *Glickman*, where the Government
 argued the compelled contributions for

1 advertising were 'part of a far broader
2 regulatory system that does not principally
3 concern speech,' ... there is no broader
4 regulatory system in place here. We have not
5 upheld compelled subsidies for speech in the
6 context of a program where the principal
7 object is speech itself. Although greater
8 regulation of the mushroom market might have
9 been implemented under the [AMAA], the
10 compelled contributions for advertising are
11 not part of some broader regulatory scheme.
12 The only program the Government contends the
13 compelled contributions serve is the very
14 advertising scheme in question. Were it
15 sufficient to say speech is germane to
itself, the limits observed in *Abood* and
Keller would be empty of meaning and
significance. The cooperative marketing
structure relied upon by the majority of the
Court in *Glickman* to sustain an ancillary
assessment finds no corollary here; the
expression respondent is required to support
is not germane to a purpose related to an
association independent from the speech
itself; and the rationale of *Abood* extends to
the party who objects to the compelled
support for this speech. For these and other
reasons we have set forth, the assessments
are not permitted under the First Amendment.

16 *Id.*, at 413-416.

17 3. *Delano Farms Co. v. California Table Grape*

18 Com'n.

19 In *Delano Farms Co. v. California Table Grape Com'n.*, *supra*,
20 318 F.3d 895, the Ninth Circuit, ruling on Plaintiffs' appeal
21 from the stipulated dismissal under Rule 12(b)(6) entered in this
22 action, addressed as the only issue, whether the principle
23 distinguishing *Glickman* and *United Foods* makes this case more
24 like *Glickman* or more like *United Foods*. *Id.*, at 896. The Ninth
25 Circuit set forth the facts as follows:

26 In 1967, a California statute called the

Ketchum Act established the California Table Grape Commission for 'the promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information' and other means. The Commission's Policy Statement says that its purpose is to aid 'producers of California fresh grapes in preventing economic waste in the marketing of their commodity,' and in acting 'in the public interest to protect and enhance the reputation of California fresh grapes for human consumption in intrastate, interstate and foreign markets.' It promotes the sale of grapes, by advertising the desirability of California grapes and also by negotiating with foreign governments to prevent and eliminate trade barriers against California grapes. It also lobbies government officials on grape-related matters and contributes to various good works such as science fair scholarships, 4-H Club grants, scholarships to children of grape field workers, and contributions to the Audubon Society.

The Commission has the statutory power to levy assessments 'upon all fresh grapes shipped during each marketing season' to pay for generic advertising, marketing, market research and development, and merchandising.

Id., at 896-897. In reversing the stipulated dismissal, the Ninth Circuit, after describing the holdings in *Glickman* and *United Foods*, ruled:

Doubtless many cases will arise that are hard to place on one side or the other of the *Glickman-United Foods* distinction, but this isn't one of them. Just as in the mushroom case, the scheme does not collectivize the industry, about 90% of the assessment money is spent on generic promotional activities, and there is no antitrust exemption. Delano Farms, Susan Neill, and Lucas Brothers, sell brand name grapes and have an interest in promoting their brands rather than and to some extent at the expense of grapes in general.

1 The Table Grape Commission argues that grapes
2 are regulated by various California statutes
3 addressing such matters as testing equipment
4 and standards for fruit maturity, container
5 standards, federal regulation of grading
6 standards (e.g., what does 'extra fancy'
7 mean?), and quality standards for exported
8 grapes. There is a 'marketing order' of the
9 collective sort in one location, though not
10 applicable to the issue in the case at bar.
11 Such consumer protection and information
12 regulations apply to much of the economy, and
13 are far from rising to the level of the
14 collectivization that controlled the result
15 in *Glickman*. Nor does the Commission attempt
16 to show mushrooms are not similarly
17 regulated, and, being food products that can
18 poison people if not properly grown,
19 harvested, labeled and sold, they probably
20 are.

11 ...

12 We of course intimate no views on economic
13 policy. The distinction between *Glickman* and
14 *United Foods* does not turn of evaluation of
15 the merits of competing policy concerns. The
16 grape growers do not operate under the 1937
17 statute [AMAA] that substituted 'collective
18 action' for the 'aggregate of consequences of
19 independent competitive choices' and
20 expressly exempted them from the antitrust
 laws, as did the ... producers in *Glickman*
 ... Rather, the business practices by the
 instant growers are governed by a statute
 similar to the one at issue in *United Foods*,
 so they are entitled to First Amendment
 protections against state compulsion to fund
 generic advertising.

21 *Id.*, at 899-900.

22 The *Delano Farms* decision accepted as true allegations of
23 the complaint about the table grape industry and Commission that
24 have been amplified or disproved by the evidentiary submissions
25 in this case.

26 4. Law of the Case.

1 Plaintiffs contend that the Ninth Circuit's ruling in *Delano*
2 *Farms v. California Table Grape Commission* controls resolution of
3 this issue as it is "the law of the case," arguing that "the
4 Ninth Circuit - *in this very case* - stated that *United Foods* -
5 NOT *GLICKMAN* - control [sic] the outcome of this case."

6 "The law of the case doctrine is a judicial invention
7 designed to aid in the efficient operation of court affairs."

8 *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715
9 (9th Cir.1990). Under the doctrine, a court is generally
10 precluded from reconsidering an issue previously decided by the
11 same court or a higher court in the identical case. *Id.* "For
12 the doctrine to apply, the issue in question must have been
13 'decided explicitly or by necessary implication in [the] previous
14 disposition." *United States v. Lummi Indians*, 235 F.3d 443, 452
15 (9th Cir.2000). Application of the doctrine is discretionary.
16 *Id.* A court abuses its discretion in applying the law of the
17 case doctrine only if (1) the first decision was clearly
18 erroneous; (2) an intervening change in the law occurred; (3) the
19 evidence on remand was substantially different; (4) other changed
20 circumstances exist; or (5) a manifest injustice would otherwise
21 result. *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th
22 Cir.1998).

23 In the Order which denied Plaintiffs' motion for judgment on
24 the pleadings on this very issue, the trial court ruled in
25 pertinent part:

26 The Appeals Court, in *Delano Farms*, could

1 decide no more than the issue before it,
2 whether the amended complaint failed to state
3 a claim under Rule 12(b) (6). The Appeals
4 Court '[took] all of the allegations of
5 material fact stated in the complaint as true
6 and construed them in the light most
7 favorable to the nonmoving party [i.e.,
8 Plaintiffs].' On a motion attacking the
9 sufficiency of the complaint, the Circuit
10 Court could not make evidentiary findings
11 resolving disputed questions of fact or
12 credibility. Rather, it construed the
13 complaint's factual assertions in the light
14 most favorable to Plaintiffs, the non-moving
15 parties. The Ninth Circuit relied upon the
16 following facts, which are disputed by
17 Defendant's answer: that (1) the 1937 [sic]
18 statute created a grape 'scheme [that] does
19 not collectivize the industry;' (2) about 90%
20 of the assessment money is spent on generic
21 promotional activities; (3) 'there is no
22 antitrust exemption' for the Commission
23 present in the 1937 [sic] statute; and (4)
24 that the Plaintiffs sell 'brand name grapes
25 and have an interest in promoting their
brands rather than and to some extent at the
expense of grapes in general.' *Delano Farms*,
318 F.3d at 899. Accepting these facts as
true, the Court of Appeal found the complaint
stated a First Amendment claim based on
United Foods, distinguished from *Glickman*.
The operative effect of this ruling reverses
the dismissal and reinstate [sic] the amended
complaint. The Appeals Court did not grant
judgment to Plaintiffs, nor did it remand the
case to the district court with instructions
to do so. In determining the meaning of an
appellate decision, the trial court must look
to the Appeals Court's dispositive language
and any directions to the lower court. Here,
the judgment of dismissal was reversed and
the case was remanded for further
proceedings. No direction is provided to the
trial court.

26 Plaintiffs' motion for judgment on the
27 pleadings, assumes the Court of Appeals
28 finally decided the case and that there are
29 no disputed issues of fact or law raised by
30 the amended complaint. Under Rule 12(c)
31 standards, for Plaintiffs to prevail, all the

1 allegations of the Defendant's answers must
2 be accepted as true and inferences drawn
3 against the moving party. The moving party
4 is entitled to judgment as a matter of law
5 only when the facts asserted do not
6 constitute a defense as a matter of law and
7 there are no factual issues to be tried. The
8 facts upon which the Plaintiff's [sic] motion
9 is based, though assumed to be true for
10 purpose of appellate review, are disputed in
11 the trial court. There has been no
12 evidentiary resolution by a hearing or trial.
13 The Appeals Court assumed Plaintiffs' factual
14 allegations to be true, that the Defendant's
15 table grape program is more like the mushroom
16 program in *United Foods* than the tree fruit
17 program in *Glickman*. However, Defendant's
18 answer alleges, *inter alia*, that the
19 California regulatory scheme has
20 collectivized the table grape industry; that
21 competition has been expressly displaced by
22 the Cartwright Act (state antitrust law)
23 exemption; that less than 70% of the
24 assessments are for generic speech purposes;
25 and that there are industry programs for
26 which assessments on industry members can
lawfully be made, such as crop-quality
research, and non-speech marketing
activities, opening foreign markets.
Plaintiffs dispute all these allegations.
These disputes cannot be resolved without an
evidentiary hearing.

17 ...
18
19
20
21
22
23
24
25
26

The extent of California table grape
collectivization is the most important factor
in determining whether the table grape
program more closely resembles the tree fruit
program or the mushroom program.
Collectivization exists when 'mandatory
assessments that fund[] a broad regulatory
apparatus that include[s], as one of its many
programs, promotional advertising. *Mich.*
Port [sic] Producers Ass'n v. Beneman [sic].
No. 02-2337/02-2338, 2003 U.S.App. LEXIS
21358, at *13 (6th Cir. Oct. 22, 2003).
Whether the Defendant's activities meet
Glickman's 'comprehensive' or
'collectivization' test, or are ancillary to
the advertising and are governed by *United*

1 *Foods*, present unresolved factual disputes.
2 Plaintiffs assert, but have not yet proven,
3 that they sell their grapes under a 'brand
4 name' or 'under the high end labels' and do
5 not benefit from generic advertising.
6 Defendant denies this allegation and alleges
7 Plaintiffs do 'benefit' from the Commission's
8 programs ... This dispute cannot be resolved
9 as a matter of law without evidence. If the
10 Commission can show that its 'generic
11 advertising assessments were "ancillary to a
12 more comprehensive program restricting
13 marketing autonomy"' that benefitted the
14 Plaintiffs, the table grape program may be
15 lawful under *Glickman*. *Delano*, 318 F.3d at
16 898.

17 The parties must be allowed to develop a full
18 factual record to permit fair and orderly
19 resolution of this dispute over the
20 regulation of California table grapes by the
21 Commission. The Supreme Court's decision in
22 *United Foods* leaves open two questions of
23 law, (1) collectivization and displacement of
24 competition, and (2) whether non-speech
25 program activities benefit Plaintiffs.

26 Plaintiffs' argument that the "law of the case" doctrine
1 makes *United Foods* binding, irrespective of the facts, is without
2 merit and has been previously rejected in the ruling on the
3 motion for judgment on the pleadings.

4 5. Plaintiffs' Factual Position that *United Foods*
5 Applies.

6 Plaintiffs emphasize the following undisputed facts in
7 contending that *United Foods* applies:

8 PUF No. 38: The Table Grape Commission has no authority to
9 set the minimum prices nor the maximum prices that shippers pay
10 to producers. A shipper can sell its grapes for whatever price
11 it wants and there are no state or federal regulations that
12

1 control or regulate price.

2 Although the Commission contends that whether it has the
3 authority to set minimum prices is a legal conclusion to which it
4 need not respond, the Commission admits this fact with the
5 clarification "that state and federal regulations do not impose
6 any direct price controls on table grapes. This fact is
7 undisputed.

8 PUF No. 39: The state does not set any federal or state
9 quantity restrictions on grapes to be produced or shipped in the
10 San Joaquin Valley. There is no pro-rate for California table
11 grapes. There are no federal marketing orders for table grapes
12 produced in the San Joaquin Valley. The Ketchum Act has no
13 quality, maturity or packaging requirements.

14 The Commission admits "with the clarification that there are
15 no direct quantity restrictions on grape production and
16 shipment", but denies this fact "insofar as State maturity and
17 quality regulations and federal export standards have the effect
18 of limiting the quantity of table grapes produced and shipped in
19 the United States." The Commission's denial relies on
20 paragraphs 3-5 and 7 of the Declaration of James Pandol, a
21 California table grape grower and marketer based in Delano, who
22 avers in pertinent part:

23 2. I am a third-generation California table
24 grape grower. I have spent most of my career
25 as vice president of marketing for my
family's table grape business. I was
previously the president and majority
shareholder of a fresh mushroom growing and
shipping business based in California.

1 3. Table grapes shipped in California are
2 subject to a number of state regulations,
3 including regulations imposing minimum
4 maturity requirements, minimum quality
5 standards, and packaging and labeling
6 requirements. California table grapes
7 exported abroad are also subject to federal
8 quality, maturity, and labeling regulations.
9 All of these regulations impact the way I and
10 other California table grape grower/shippers
11 do business. The regulations limit what we
12 can and cannot do by imposing standards and
13 other requirements that we all have to meet
14 if we want to ship our fruit. The
15 regulations require all California table
16 grape growers and shippers to follow the same
17 rules in order to maintain demand for
18 California table grapes. Almost all of these
19 regulations, in fact, were developed with
20 input from the table grape industry.

21 4. The California maturity regulations
22 require growers to leave grapes on the vine
23 long enough to make sure that the sugar
24 content of the grapes reaches a required
25 minimum level. The regulations prevent
26 growers from attempting to take advantage of
27 high early market prices by selling immature,
28 sour grapes, which would turn off customers
29 and weaken demand for all California grapes.
30 By prohibiting growers from picking and
31 selling grapes too early, the regulations
32 help the entire industry maintain demand for
33 California grapes. In the absence of a
34 mandatory rule requiring all growers to
35 market only mature fruit, there would likely
36 be a small group of growers that would try to
37 ship their fruit early (when prices are high)
38 even though doing so hurts all of the growers
39 who ship their grapes later, after the grapes
40 have matured.

41 5. The California quality regulations also
42 have the effect of limiting sales of
43 California grapes for the collective benefit
44 of all California growers. The regulations
45 prohibit the shipment of table grapes that
46 are damaged due to insects, mold, decay,
47 freezing, sunburn, and other conditions. By
48 keeping low-quality grapes off the market,
49 the California regulations ensure that

1 overall consumer demand for California table
2 grapes is not adversely affected by the self-
3 interested decisions of individual
4 grower/shippers to try to sell poor quality
5 fruit.

6 ...

7 7. Finally, federal regulations governing
8 exports of California table grapes limit the
9 quantity and quality of California grapes
10 exported. Depending upon the country to
11 which a shipment is destined, federal
12 regulations require the grapes shipped to
13 meet certain USDA grade quality standards.
14 The industry pushed for development of these
15 standards because without them some
16 California table grape growers would likely
17 export lower quality fruit, and it does not
18 take much poor quality fruit to decrease
19 demand in a market. By limiting the export
20 of California table grapes to only those
21 grapes that meet certain requirements,
22 federal regulations benefit the entire
23 industry by preventing shippers from taking
24 actions that might be profitable to them in
25 the short-run but that would hurt the entire
26 industry in the long-run.

1 Plaintiffs object to Mr. Pandol's declaration, contending it
2 "lacks foundation, is speculative, it is hearsay and conclusory
3 as to what 'other grower/shippers' their business [sic]" and
4 because it is irrelevant.

5 Plaintiffs' objections are sustained to the extent that the
6 rules (state and federal) are the best evidence of their content.
7 Mr. Padol may explain his understanding of how the rules apply to
8 grape growers. The objections are sustained to how the rules and
9 regulations are interpreted by others, but Mr. Pandol's opinions
10 are admissible to describe the effect the rules have on his
11 growing, harvesting, shipping and marketing practices.

1 PUF No. 40: There is no federal or state legislation, nor
2 none in the Ketchum Act, that restricts the quantity of table
3 grapes that can be sold. There is no law that forbids a shipper
4 from dumping table grapes at a cheap price on the market. There
5 are no federal or state regulations regarding price limitations
6 for which a shipper can sell table grapes. The Table Grape
7 Commission does not take title to grapes nor does the Table Grape
8 Commission act as a cooperative in selling table grapes.

9 The Commission admits "with the clarification that antitrust
10 and other laws may 'forbid[] a shipper from dumping table grapes
11 at a cheap price on the market' and the further clarification
12 that there are no *direct* quantity restrictions on grape sales or
13 *direct* price controls for table grapes." Again relying on Mr.
14 Pandol's declaration, the Commission denies the facts "insofar as
15 "state maturity and quality regulations and federal export
16 standards have the effect of limiting the quantity of table
17 grapes sold."

18 PUF No. 41: The only regulation that the Ketchum Act has
19 over the shipper is that the shipper is required to file reports
20 regarding the sales of table grapes and to pay the assessments.

21 The Commission admits that the shippers are required to file
22 reports and to pay assessments pursuant to the Ketchum Act, but
23 denies "that they are the only regulations that could be imposed
24 pursuant to the Ketchum Act." This fact is disputed. [OWW ???]

25 PUF No. 42: The Commission has no authority to impose volume
26 control on the production or shipment of table grapes. There is

1 no authority to set minimum prices for what table grapes can be
2 sold.

3 The Commission asserts that “[t]his is a legal contention to
4 which the Commission need not respond.” The Commission’s
5 opposition asserts that it has not moved for summary judgment on
6 the “collectivization” issue, that there are issues of fact that
7 preclude summary adjudication for Plaintiffs that *United Foods*
8 rather than *Glickman* applies.

9 The Commission refers to state and federal regulations
10 imposing restrictions on the growing and shipping of table
11 grapes. The state regulations call for table grapes to be free
12 from serious damage due to insects, mold, decay, freezing, and
13 sunburn, Cal.CodeRegs. tit. 3 §§ 1436.18, 1436.24, define what
14 constitutes “serious damage” in table grapes, *id.*, § 1436.19, and
15 require a specific percentage of grapes in a container or bulk
16 lot to be free from serious damage, *id.*, § 1436.20. Additional
17 regulations impose minimum maturity requirements, *id.*, §§
18 1436.12, 1436.17, 1436.18, specifying the sampling and testing
19 methods for maturity, *id.*, §§ 1370.16, 1436.3, 1436.5, and set
20 testing equipment standards, *id.*, §§ 1436.6, 1437.7. Other
21 regulations prohibit mislabeling of varieties, proscribe the use
22 of particular variety designations, *id.*, §§ 1436.30, 1436.31,
23 1436.42, and provide detailed specifications of what containers
24 may be used, how they must be packed, how they must be closed,
25 *id.*, §§ 1436.37, 1436.38, 1380.19, and further requirements for
26 grapes being shipped out of state, *id.*, § 1436.

1 Federal regulations define grades for table grapes, 7 C.F.R.
2 §§ 51.1880-51.913, set the minimum standards for each grade,
3 including requirements for berry size, maturity and firmness,
4 bunch and stem characteristics, prohibited defects, and
5 tolerances. Additional regulations impose quality, maturity and
6 labeling requirements for grapes exported to foreign countries
7 and require the shipper to obtain a certificate from the USDA
8 that the grapes meet quality and labeling requirements imposed by
9 the regulations. 7 C.F.R. §§ 35.11, 591. Federal statutory
10 provisions and regulations govern fees for inspection and
11 certification services, 7 U.S.C. § 595, when inspections must
12 occur, 7 C.F.R. § 35.12, and the process for obtaining
13 inspections and certifications, 7 C.F.R. §§ 51.-4-51.61.
14 Moreover, a federal marketing order governs grapes grown in
15 southeastern California.

16 The Commission maintains that these state and federal laws
17 and regulations have the "practical effect" of collectivizing the
18 California table grape industry, contending that, in a number of
19 respects, independent business activity has been displaced by
20 collective action. The Commission asserts that, to understand
21 this "practical effect", the market for table grapes and the
22 structure of the California table grape industry must be
23 understood.

24 The Commission refers to the Undisputed Stipulated Facts
25 that table grapes are not "branded" in the retail market and that
26 consumers view table grapes as a commodity; that retailers do not

1 typically indicate the name of the grower/shipper on store
2 signage displaying grapes; and that, most of the time, grapes'
3 packaging does not reveal the grower/shippers' name. The
4 Commission also submits evidence that the majority of consumers
5 do not know the names of the grower/shippers; nor the labels
6 under which the grower/shippers sell their grapes to wholesalers
7 and retailers; and do not shop for grapes in the retail market
8 with brand names in mind. Further evidence shows Plaintiffs'
9 grapes are not branded at the consumer level and expert testimony
10 based on a survey of primary grocery shoppers indicates that
11 consumers do not know the Plaintiffs' "brand" names.

12 All of this evidence is said to demonstrate that consumers
13 do not know the brands or labels of individual grape growers,
14 "the fortunes of California table grape producers are
15 inextricably bound together":

16 Where consumers do not differentiate between
17 table grapes from different producers, each
18 California table grape grower is dependent
19 upon other growers not to sell poor quality
grapes that will weaken demand across the
board. In this environment, the maturity and
quality regulations that govern the table
grape industry are not mere 'consumer
protection' regulations but are, more
fundamentally, restrictions that table grape
growers have urged the state and federal
government to adopt in order to protect the
industry and that serve to collectivize the
industry.

23 This position is based primarily on the Pandol declaration.
24

25 Further evidence that the Ketchum Act collectivizes the
table grape industry is found in the breadth of the Commission's
26

1 work, which reaches well beyond advertising and displaces
2 individual firm activities in favor of collective activities.
3 This includes the Commission's work to develop and patent better
4 varieties of table grapes; to discover and publicize the health
5 benefits of table grapes; to initiate better cultural practices;
6 to open new markets; and to improve grape storage and handling.
7 The Commission undertakes these actions on behalf of all
8 California table grape growers for their collective benefit. The
9 Commission describes its patenting activities of new grape
10 varieties, which are made available to growers on certain terms.
11 The Commission develops protocols for shipping table grapes to
12 various foreign countries, has a constraining effect on the table
13 grape industry, which further serves to collectivize the table
14 grape industry.

15 From the totality of the circumstances: "[t]he practical
16 effect of the regulatory regime governing the table grape
17 industry stands in stark contrast to the regime governing the
18 mushroom industry at issue in *United Foods*." The Commission
19 relies on Mr. Pandol's declaration:

20 8. In contrast to California table grapes,
21 shipments of fresh mushrooms are subject to
exceedingly little government regulation.
There are no federal or California quality
restrictions, maturity standards, size
standards, grade standards, or packaging
requirements applicable specifically to
mushrooms. The principal regulation
affecting the marketing of mushrooms is the
assessment paid to support the Mushroom
Council. Because there are no maturity,
size, or packaging regulations applicable to
mushrooms, individual mushroom shippers

1 attempt to differentiate their mushrooms by
2 varying maturity, size, or packaging. The
3 absence of these regulations have made fresh
 mushrooms less of a 'commodity' product than
 other regulated products, like table grapes.

4 The Commission notes that the Supreme Court observed in *United*
5 *Foods* that "[b]eyond the collection and disbursement of
6 advertising funds, there are no marketing orders that regulate
7 how mushrooms may be produced and sold, no exemption from the
8 antitrust laws, and nothing preventing individual producers from
9 making their own marketing decisions." No federal regulations
10 for mushroom grade standards have been issued. In *United Foods*,
11 the government was only able to refer to the federal statute
12 establishing the Mushroom Council, which authorized the Mushroom
13 Council to develop voluntary standards, and to the AMAA, pursuant
14 to which a marketing order governing mushrooms could have been,
15 but was not promulgated. Almost all of the Mushroom Council's
16 activities were devoted to generic advertising; therefore, the
17 Mushroom Council could not have displaced any significant aspect
18 of independent business activity, comparable to the Commission's
19 non-advertising activities in the table grape industry.

20 Plaintiffs' argument that the California table grape
21 industry is not collectivized, rests largely on the fact that
22 state and federal regulations do not directly regulate the price
23 and volume of sales. The Commission counters that the absence of
24 direct price and quantity regulation is not determinative, as the
25 marketing order found constitutional in *Glickman* did not contain
26 direct price or quantity restrictions and that, nonetheless, the

1 Supreme Court concluded that California tree fruit was marketed
2 "pursuant to detailed marketing orders that have displaced many
3 aspects of independent business activity." From this, the
4 Commission argues, Plaintiffs' motion for summary adjudication
5 that *United Foods* controls, rather than *Glickman*, should be
6 denied.

7 Plaintiffs respond that the regulations and statutes now
8 relied on by the Commission were presented to the Ninth Circuit
9 in *Delano Farms*, and the Ninth Circuit ruled that "[s]uch
10 consumer protection and information regulations apply to much of
11 the economy, and are far from rising to the level of the
12 collectivization that controlled the result in *Glickman*."
13 Plaintiffs object to Mr. Pandol's averments as uninformed and
14 irrelevant. Plaintiffs point to the Supreme Court's note in
15 *Johanns*, *supra*, 544 U.S. at 558 n.3:

16 In *United Foods*, the Court distinguished (and
17 the dissent relied on) *Glickman* . . . , which
18 upheld the use of mandatory assessments to
fund generic advertising promoting California
tree fruit. In *Glickman*, as in *United Foods*,
the Government did not argue that the
advertising was permissible government speech
... Rather, the Government contended, and we
agreed, that compelled support for generic
advertising was legitimately part of the
Government's 'collectivist' centralization of
the market for tree fruit ... Here, as in
United Foods, 'there is no broader regulatory
system in place' that collectivizes aspects
of the beef market unrelated to speech, so
Glickman is not controlling.

24 Plaintiffs emphasize that Ketchum Act has no maturity, quality,
25 or packaging requirements and that producers of table grapes are
26

1 not regulated by state or federal law concerning price, quantity,
2 volume, or shipping quotas. Plaintiffs contend that as with the
3 mushroom growers in *United Foods*, table grape producers "are not
4 forced to associate as a group which makes cooperative
5 decisions." 533 U.S. at 413.

6 Plaintiffs discount the Commission's position that table
7 grapes are not branded at the consumer level:

8 It is not even the beginning of [the] turning
9 point as to whether or not the consumers
observe the brand of table grapes. The
consumers cannot buy any table grapes unless
the retailers buy the branded grapes from the
shippers like Plaintiffs. But in any event,
it is not a collectivization of the industry,
whether the consumers see the brand or not.
12

13 With regard to the Commission's evidence and argument that
its programs and activities reach well beyond advertising,
14 Plaintiffs rejoin that all of those "demand-enhancing"
activities, i.e., research, trade management, issues management,
16 education and outreach, domestic marketing, are "all speech
17 related programs, they are not the regulatory programs that have
18 collectivized the industry or required the compelled association
for non-speech related regulatory programs that *United Foods* ...
20 would countenance." Plaintiffs rely on a district court
21 decision, *In re Washington State Apple Advertising Com'n, supra*,
22 257 F.Supp.2d at 1302:⁶
23

24 Like *United Foods*, the Apple Commission's

25 ⁶Plaintiffs cite *Pork Producers Ass'n., Inc. v. Veneman*,
26 *supra*, 348 F.3d at 163. For the reasons stated above, this case no
longer constitutes valid authority.

1 essential purpose is the advertisements and
2 other marketing which it produces. In the
3 years 1998-99 through 2001-02, the Commission
4 spent between 62.5% of 85% of its budget
5 expenditures were spent on 'marketing'
6 activities ... Those same spreadsheets
7 reflect that while not all of that budget is
8 allocated to 'consumer advertising,' the vast
9 majority of 'marketing' expenditures fits
10 within four categories: (1) publications; (2)
11 trade advertising; (3) consumer advertising
12 (4) promotions. The Court finds that these
13 constitute 'speech' for the purposes of
14 analysis. Plaintiffs cite *Pelts & Skins, LLC*
15 v. *Landreneau, supra*, 365 F.3d at 434:
16 We recognize that, unlike the assessments at
17 issue in *United Foods, Cochran, and Delano*
18 *Farms*, a majority of the alligator-related
19 assessments fund programs other than generic
marketing ... In each of the past several
years, the Council has spent approximately
15% of the Resource Fund on generic marketing
and the remainder on research and law
enforcement. This distinction in the
percentage of fees that go to generic
marketing does not support applying *Glickman*
to this case. The key element in *Glickman* -
a highly collectivized marketing association
- is still absent. The common thread uniting
Abood, Keller, Glickman, and United Foods is
that compelled subsidization of speech is
permissible when individuals have been bound
into a collective association ... The fees
imposed here, though used for more than
generic marketing, represent a collective
association only in the loosest sense of that
term.

20 Facially admissible evidence establishes greater industry
21 collectivization than Plaintiffs' acknowledge. Plaintiffs point
22 to every minute fact describing the Commission's activities and
23 characterize each as speech. The undisputed facts show that more
24 than 60% of the Commission's activities do not involve speech or
25 expressive activity.

26 Plaintiffs' motion for partial summary judgment that *United*

1 *Foods rather than Glickman* applies to the Commission's statutory
2 program is DENIED.

3 I. ABOOD'S "GERMANENESS" TEST.

4 If *Johanns* does not apply, the Commission moves for summary
5 judgment that the Ketchum Act is constitutional under the
6 "germaneness" test articulated in *Abood v. Detroit Board of
7 Education, supra*, 431 U.S. 209. The Commission asserts that,
8 even if the Ketchum Act is found to implicate the First
9 Amendment, the Ketchum Act is constitutional under the
10 "germaneness" test because the Commission's "advertising is
11 germane to a broader program that serves important governmental
12 interests and that is not related solely to speech."

13 1. Applicability of Test.

14 The Commission argues that *Glickman* and *United Foods* "make
15 clear that compelled funding of generic advertising undertaken by
16 a commodity research and promotion program is constitutional
17 under the *Abood* germaneness test if the advertising is germane to
18 a broader program that serves an important governmental interest
19 and that is broader than the advertising itself." Plaintiffs
20 respond that the Commission "erroneously conflates the *Abood*
21 'germaneness' test with *Glickman*, when the analysis must be under
22 *United Foods*." Plaintiffs contend:

23 The Commission substantially errs in claiming
24 that its advertising program is germane to a
25 'broad program that serves important
26 governmental interests and that is not solely
 related to speech.' First of all, 'solely'
 is not to be found in *United Foods* nor in
 Delano Farms; instead those two cases held

1 when the program is not a collectivized
2 regulatory program, and when the principle
3 object of the program is speech the program
4 is unconstitutional.

5 The Commission rejoins that Plaintiffs misread *Glickman*.
6 First, the Supreme Court concluded that the generic advertising
7 program at issue in *Glickman* did not implicate the First
8 Amendment, 521 U.S. at 469-470, 474-476, but that, even if the
9 marketing orders did implicate the First Amendment, they were
10 constitutional under *Abood*'s "germaneness" test, 521 U.S. at 473.
11 Second, *United Foods* held that the First Amendment was implicated
12 because the mushroom industry was not "collectivized" as the tree
13 fruit industry was in *Glickman*. The Supreme Court then
14 considered the mushroom program under the *Abood* test, and
15 concluded that "[t]he cooperative marketing structure relied upon
16 by the majority of the Court in *Glickman* to sustain an ancillary
17 assessment finds no corollary here; the expression respondent is
18 required to support is not germane to a purpose related to an
19 association independent from the speech itself; and the rationale
20 of *Abood* extends to the party who objects to the compelled
21 support for this speech." 533 U.S. at 415. The Commission
22 replies:

23 Plaintiffs' contention that the challenged
24 speech must be germane to a regulatory
25 scheme, not just a broader program of
26 activity, is flatly inconsistent with *Abood*
27 itself. In *Abood*, the Court did not consider
28 whether the challenged speech was germane to
29 regulations of the sort at issue in
30 [Glickman] - regulations that constrain the
31 entities being required to fund the
32 challenged speech. Rather, the Court

1 considered whether the challenged speech was
2 germane to another union activity, collective
3 bargaining. See 431 U.S. at 235-236.

4 Similarly, in *United Foods*, the Court held
5 that *Abood's* germaneness test could not be
6 satisfied because the test requires 'an
7 associational purpose' distinct from the
challenged speech of a program - the
challenged speech cannot be 'germane to
itself.' 533 U.S. at 413, 415. Nothing
about this rationale requires the broader
program to which the challenged speech must
be germane to price, quantity, quality, or
packaging regulations [sic].

8 The Commission's interpretation of the *Abood* test is correct
9 as the Commission's purpose is economic enhancement of the table
10 grape industry, consumer protection from enhanced research and
11 development of new varieties of grapes, and facilitating the
12 entry into and expansion of domestic and international markets
13 for table grapes.

14 2. Satisfaction of Germaneness Test.

15 The Commission argues that the Ketchum Act is constitutional
16 under the germaneness test because: (1) it created a broad
17 industry program, of which advertising is just one part, that
18 serves California's important legislatively declared economic
19 interest in expanding demand for California table grapes; and (2)
20 the Commission's advertising is germane to that broader program
21 and interest.

22 a. Broad Program.

23 The Commission suggests that the Ketchum Act serves
24 primarily an economic purpose of expanding demand for California
25 table grapes worldwide, thereby strengthening California's
26

1 economy and improving the health and welfare of its citizens.
2 The Commission contends that the Ketchum Act's purpose is related
3 principally to economic public welfare, not speech, and that
4 California's interests in strengthening its economy and improving
5 the welfare and health of its citizens are indisputably
6 important.

7 To support its contention that the program enacted by the
8 Ketchum Act is much broader than advertising, the Commission
9 references Cal.Food & Agric. Code § 65572, which empowers the
10 Commission in pertinent part:

11 (h) To promote the sale of fresh grapes by
12 advertising and other similar means for the
13 purpose of maintaining and expanding present
14 markets and creating new and larger
15 intrastate, interstate and foreign markets
for fresh grapes; to educate and instruct the
public with respect to fresh grapes; and the
uses and times to use the several varieties,
and the healthful properties and dietetic
value of fresh grapes.

16 (i) In the discretion of the commission, to
17 educate and instruct the wholesale and retail
18 trade with respect to proper methods of
19 handling and selling fresh grapes; to arrange
20 for the performance of dealer service work
21 providing display and other promotional
22 materials; to make market surveys and
23 analyses; and to present facts to and
negotiate with state, federal and foreign
agencies on matters which affect the
marketing and distribution of fresh grapes;
and to undertake any other similar activities
which the commission may determine
appropriate for the maintenance and expansion
of present markets and the creation of new
and larger markets for fresh grapes.

25 (j) In the discretion of the commission, to
26 make in the name of the commission contracts
to render service in formulating and

conducting plans and programs, and such other contracts or agreements as the commission may deem necessary for the promotion and sale of fresh grapes.

(k) In the discretion of the commission, to conduct, and contract with others to conduct, scientific research, including the study, analysis, dissemination and accumulation of information obtained from such research or elsewhere respecting the marketing and distribution of fresh grapes, the production, storage, refrigeration, inspection and transportation thereof, to develop and discover the dietetic value of fresh grapes and to develop and expand markets, and to improve cultural practices and product handling so that the various varieties may be placed in the hands of the ultimate consumer in the best possible condition. In connection with such research, the commission shall have the power to accept contributions of, or to match, private, state or federal funds that may be available for these purposes, and to employ or make contributions of funds to other persons or state or federal agencies conducting such research.

•

(m) In the discretion of the commission, to publish and distribute without charge a bulletin or other communication for dissemination of information relating to the fresh grape industry to producers and shippers.

Referring to evidence submitted in support of its motion for summary judgment, the Commission describes the various programs it has effectuated, i.e., research, trade management, issues management, and education and outreach.

As to research, the Commission cites the Undisputed Stipulated Facts that it directs and oversees the funding, and provides direction in the implementation of viticulture research

1 performed by scientists from research institutions such as the
2 University of California, California State University, and the
3 USDA, designed to increase grower efficiency and improve grape
4 production and fruit quality, and resulting in creation of new
5 varieties that account for approximately 45% of the California
6 table grapes shipped to market. Evidence demonstrates additional
7 research is conducted related to category management and consumer
8 preference, which provides retailers with information about the
9 value of selling California table grapes and how to increase
10 sales, and with consumer research and data showing how an
11 individual retailer's sales of table grapes compare to sales by
12 comparable retailers. The Commission also conducts research on
13 international topics, such as production studies of foreign
14 countries, transhipments, and consumer research. The Commission
15 conducts a phytonutrient research program that analyzes the
16 health benefits of table grapes, and has discovered links between
17 the compounds in table grapes and the fighting or prevention of
18 cancer, heart disease and degenerative nerve damage.

19 Plaintiffs respond that the research conducted by the
20 Commission is less than 10% of its total budget based on the
21 Commission's budgets for crop years 1994-1995 to the present.
22 Referring to Section 65572(k), Plaintiffs assert that the
23 Commission is required to disseminate its research results and
24 does so. Plaintiffs argue that research "is akin to gathering
25 the news and gathering the news is only relevant if the
26 information is disseminated and all is in the process of 'speech'

1 or the press likewise protected by the First Amendment." In so
2 arguing, Plaintiffs cite *Keyishian v. Board of Regents of*
3 *University of State of N.Y.*, 385 U.S. 589, 603 (1967) ("[Academic]
4 freedom is ... a special concern of the First Amendment, which
5 does not tolerate laws that cast a pall of orthodoxy over the
6 classroom"); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250
7 (1957) ("Teachers and students must always remain free to inquire,
8 to study and to evaluate, to gain new maturity and understanding;
9 otherwise our civilization will stagnate and die"); *CBS, Inc. v.*
10 *Smith*,, 681 F.Supp. 794, 802-803 (S.D.Fla.1988) ("The gathering of
11 news of political consequence is a necessary corollary to the
12 freedom to report about politics and government ... Simply put,
13 newsgathering is a basic right protected by the First Amendment;
14 'without some protection for seeking out the news, freedom of the
15 press could be eviscerated.'"). Plaintiffs argue that research
16 is "worthless" without dissemination. Further, the Commission's
17 research activities dealing with category management, consumer
18 preference, and the health benefits of table grapes all "involve
19 essential elements of speech because the information is provided
20 to producers, shippers and ... retailers."

21 The Commission responds that its 2004-2005 research
22 activities accounted for 22% of its total expenditures and that
23 Plaintiffs unsupported conclusion that research is always less
24 than 10% of the Commission's budget is wrong in the face of the
25 undisputed evidence submitted by the Commission. The Commission
26 asserts that its research activities are not "speech", citing

1 *United States v. Frame*, 885 F.2d 1119, 1131 (3d Cir.), cert.
2 denied, 493 U.S. 1094 (1989) ("[T]he aspect of the Beef Promotion
3 Act which imposes assessments for research purposes qualifies as
4 neither 'expressive' nor 'intimate' association, and therefore
5 does not implicate Frame's first amendment rights"). The
6 Commission argues that "[e]ven if Plaintiffs were right that the
7 dissemination of research results implicates the First Amendment
8 - which is not the case - the research itself nevertheless would
9 not implicate the 'compelled subsidy' doctrine.

10 For trade management, the Commission points to evidence of
11 its efforts to increase sales of table grapes to domestic and
12 international wholesalers. Domestically, the Commission works
13 with retailers to increase the quantity of table grapes sold
14 during the season; to increase the square footage of table grape
15 display space and the number of varieties displayed; to improve
16 the effectiveness of these displays; and to increase the number
17 and effectiveness of table grape advertisements run by the
18 retailers, including providing training to retailers' produce
19 staff for handling, storing and displaying table grapes. The
20 Commission enters into promotional incentive agreements with
21 wholesalers and retailers by which the Commission agrees to
22 provide goods and services to a retailer if the retailer meets a
23 target for total grape sales volume. The Commission encourages
24 foodservice providers to increase their purchases of table grapes
25 by developing recipes that it sends to foodservice providers; by
26 contacting editors and writers of foodservice publications; and

1 by retaining a registered dietician as a consultant.

2 In international trade management activities, the Commission
3 has fifteen overseas representatives, who work directly with
4 overseas retailers, importers and wholesalers, to provide grape
5 storage, handling, and display information and monitor local
6 markets in order to provide information that is sent twice a
7 month during the California season to California table grape
8 grower/shippers. The overseas' representatives also organize
9 activities such as in-store grape tastings and cooking
10 demonstrations, and provide financial awards to retailers for
11 grape promotional activities.

12 Plaintiffs argue that all the Commission's trade management
13 are "all speech":

14 The way to discern whether this is speech, is
15 to look at it from the standpoint of
16 Plaintiffs or any shippers or any service
17 providers or any retailer engaging in the
18 same conduct; that is what the Commission
19 does, if done by a private person, would
20 absolutely be protected by the First
21 Amendment. Since it would be protected by
22 the First Amendment if private persons (such
23 as Plaintiffs) engaged in that conduct, the
24 First Amendment bars Plaintiffs being
25 compelled to fund others doing it.

26 The Commission replies that its trade management activities
27 "may involve people speaking, but none of it consists of public
28 dissemination of messages to which Plaintiffs object." The
29 Commission is correct as the purpose of trade management is to
30 assure enhanced and effective world-wide distribution, compliance
31 with regulatory requirements of world-wide markets to assure
32

1 access and participation, and remedial actions to address
2 quarantine, embargos, and other governmental impediments to
3 continued access into and participation in new and existing
4 markets.

5 The Commission refers issues management, which entails the
6 Commission's work with interested parties and decisionmakers to
7 keep trade flowing in the United States and internationally and
8 to respond to issues that could impair the distribution of
9 California table grapes and the economic strength of the
10 industry. The Commission asserts that a significant portion of
11 this work is related to gaining and maintaining access to
12 international markets. The Commission's evidence shows that it
13 sponsored research and worked with the USDA and the Office of the
14 U.S. Trade Representative (USTR) to negotiate and implement a
15 shipping protocol with Australia that called for grapes to be
16 inspected and fumigated; that it has helped to open markets for
17 California table grapes in China and India; that it helped to
18 keep the market in the United Kingdom open when U.K. retailers
19 threatened to stop importation of California table grapes in 2002
20 following the discovery of a black widow spider in a shipment;
21 and that it helped reverse a 2004 announcement by Thailand
22 effectively banning three chemicals by setting a zero tolerance on
23 them, preventing the importation of California table grapes. The
24 Commission also refers to evidence that it works with USDA and
25 USTR to lower tariff and non-tariff barriers that impede the
26 importation of California table grapes and that it has opened or

1 improved access to California table grapes in a number of
2 countries or regions.

3 The Commission describes its issue management work related
4 to pesticides, pest exclusion, production, packaging,
5 distribution and quarantine, such as monitoring chemical Maximum
6 Residue Level restrictions to determine whether the MRL affects
7 California table grapes, whether the proposed MRL is lower than
8 U.S. or international standards, and whether the proposed MRL
9 will disrupt shipments of California table grapes to the country
10 in question. The Commission explains its patenting and licensing
11 program pursuant to which the Commission has developed new
12 varieties jointly with the USDA and licensed newly patented
13 varieties, applied for intellectual property protection abroad,
14 set the terms on which new varieties are available abroad, and
15 enforced foreign intellectual property rights obtained.

16 Plaintiffs argue that all of the categories of activities
17 identified as issues management, if done by a private person,
18 would be fully protected by the First Amendment and "all fall
19 within the category of 'speech' subject to *United Foods* and the
20 *Delano Farms* Ninth Circuit decision." This characterization is
21 overbroad and unfair. The activities described may require
22 communication, but not to advertise or promote, rather to address
23 scientific and regulatory concerns.

24 On the subject of education and outreach, the Commission's
25 evidence shows that it provides education, training, analysis,
26 and general information relating to California table grapes to

1 retailers, wholesales, foodservice providers, grower/shippers,
2 researchers, consumers, teachers, editors, authors, doctors and
3 nutritionists.

4 Plaintiffs interpose the same argument, "that since neither
5 the State nor Congress could prohibit Plaintiff [sic] from doing
6 the same activity because it involves speech, it falls within the
7 umbrella of *United Foods* ... that precludes compelled funding of
8 the same activities."

9 The Commission responds that its evidence establishes that
10 of its broad range of activities, only one is advertising, and
11 the others enhance demand for California table grapes, strengthen
12 California's economy, and improve the health and welfare of its
13 citizens. For the 2004-2005 fiscal year, the four categories,
14 i.e., research, trade management, issues management, and
15 education and outreach, accounted for the following percentages
16 of the Commission's expenditures of assessments: 22% on research,
17 24% on trade management, 18% on issues management, and 10% on
18 education and outreach. From this evidence it is evident that
19 advertising has never been "almost all" of the Commission's
20 program, in contrast to *United Foods*, *supra*, 533 U.S. at 412,
21 where "almost all of the funds collected under the mandatory
22 assessments are for one purpose: generic advertising". The
23 Commission contends that it is "just the sort of broad economic
24 program to which *Abood*'s germaneness analysis applies."

25 Plaintiffs cite *Pelts & Skins, LLC v. Landreneau*, *supra*, 365
26 F.3d at 434 and *Michigan Pork Producers Ass'n., Inc. v. Veneman*,

1 supra, 348 F.3d at 163 to argue that the Commission's research,
2 trade management, issues management and education and outreach
3 activities are "all speech related programs, not the regulatory
4 programs that have collectivized the industry or required the
5 compelled association for non-speech related regulatory programs
6 that *United Foods* ... would countenance." As stated above, these
7 Circuit Court opinions no longer constitute valid authority, but
8 more importantly Plaintiffs' characterization of every Commission
9 activity as speech is nothing more than argumentative legal
10 conclusions, not supported by the facts.

11 Plaintiff also cite *In re Washington State Apple Advertising*
12 *Com'n*, *supra*, 257 F.Supp.2d at 1302:

13 Like *United Foods*, the Apple Commission's
14 essential purpose is the advertisements and
15 other marketing which it produces. In the
16 years 1998-99 through 2001-02, the Commission
17 spent between 62.5% of 85% of its budget
18 expenditures were spent on 'marketing'
19 activities ... Those same spreadsheets
20 reflect that while not all of that budget is
allocated to 'consumer advertising,' the vast
majority of 'marketing' expenditures fits
within four categories: (1) publications; (2)
trade advertising; (3) consumer advertising
(4) promotions. The Court finds that these
constitute 'speech' for the purposes of
analysis.

21 The Commission argues the District Court opinion is
22 unsupported by analysis and strays "from the proposition that a
23 'compelled subsidy' claim looks only to any publicly
24 disseminated message with which the plaintiffs disagree."
25 The Commission cites *Johanns*, 544 U.S. at 557 ("[t]he reasoning
26 of these compelled-speech cases has been carried over to certain

1 instances in which individuals are compelled not to speak, but to
2 subsidize a private message with which they disagree"), and
3 interprets the Supreme Court holding that the First Amendment
4 applies only in this context if the plaintiff actually objects to
5 a message he is compelled to fund and it is not enough that a
6 party object to funding an organization on the ground that free
7 competition is preferable to socialism or that the organization
8 does not use the funds effectively. The Commission argues that
9 Plaintiffs do not object to any message conveyed by the
10 overwhelming majority of the Commission's work nor do many of the
11 Commission's activities convey any particular message to which
12 Plaintiffs might possibly object. The Commission refers to
13 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547
14 U.S. 47 (2006), that upheld a federal statute which required the
15 Department of Defense to deny federal funding of colleges and
16 universities that prohibited military representatives access to
17 and assistance for recruiting purposes. A portion of the opinion
18 addressed the argument that the statute constituted "compelled
19 speech" because recruiting assistants provided by the schools
20 often sent e-mails or posted notices on bulletin boards:
21 "Compelling a law school that sends scheduling e-mails for other
22 recruiters to send one for a military recruiter is simply not the
23 same as forcing a student to pledge allegiance, or forcing a
24 Jehovah's Witness to display the motto 'Live Free or Die,' and it
25 trivializes the freedom protected by *Barnette* and *Wooley* to
26 suggest that it is." 547 U.S. at 62.

1 The Commission also offers *Lehnert v. Ferris Faculty Ass'n*,
2 500 U.S. 507, 529 (1991) ("[P]ublic speech in support of the
3 teaching profession generally is not sufficiently related to the
4 union's collective bargaining functions to justify compelling
5 dissenting employees to support it), as establishing that
6 compelled funding of speech implicates the First Amendment only
7 if it involves dissemination of a message. The Commission
8 argues:

9 Drawing a distinction between speech that is
10 publicly disseminated and conveys a
11 particular message to which a party might
12 possibly object - like generic advertising -
13 and non-public speech or speech with no
14 particular message to which a party might
15 possibly object makes perfect sense.
16 Plaintiffs' theory - that they cannot be
17 compelled to fund any activity that involves
18 the spoken (or written) word - cannot be the
19 law. As the Supreme Court has noted in
20 rejecting a freedom of association challenge
21 to a law restricting access to dance halls,
22 '[i]t is possible to find some kernel of
23 expression in almost every activity a person
24 undertakes - for example, walking down the
25 street or meeting one's friends at a shopping
mall - but such a kernel is not sufficient to
bring the activity within the protection of
the First Amendment.' *City of Dallas v.*
Stanglin, 490 U.S. 19, 25 (1989). Every
activity a union or agricultural commission
might engage in likely involves some person
uttering some word - like a grape breeder
giving instructions to her assistant - yet
the Supreme Court in *Abood*, [Glickman], and
United Foods did not hold that the funding of
every activity potentially implicates the
First Amendment. Under Plaintiffs' view, a
law imposing a toll for crossing the Golden
Gate Bridge would violate the First Amendment
if a portion of the toll proceeds paid toll
collectors who must speak to motorists.

26 The Commission concludes that its "non-advertising activities

1 form the broader, constitutionally permissible, program to which
2 the Commission's advertising can be germane." The evidence
3 establishes that advertising was only 25% of the Commission's
4 expenditures in 2004-2005 and has never been more than 50% of the
5 assessment expenditures during the relevant time period.

6 The totality of the circumstances of the Commission's
7 industry activities are germane within the meaning of *Abood* to
8 achieving the legislatively adopted economic objectives.

9 b. Germane to Commission's Broad Program.

10 The Commission asserts it is entitled to summary judgment
11 that its generic advertising is germane to the Commission's
12 broader demand-enhancement program under the *Abood* test, because
13 all of its advertisements are designed to motivate consumers to
14 buy more fresh California table grapes; that its advertisements
15 have not promoted products other than California table grapes;
16 that the Commission has not run political or ideological
17 advertisements; that its advertisements have been in good taste
18 and are not false or misleading; and that its advertisement have
19 increased demand for California table grapes, which benefits the
20 table grape industry, the California economy, and the health and
21 welfare of its citizens. Finally, this advertising works in
22 conjunction with its other non-speech activities, including the
23 current advertising campaign that emphasizes grapes as a healthy
24 snack alternative.

25 The totality to the circumstances of the Commission's
26 industry program are germane within the meaning of *Abood* to

1 achieving the legislatively adopted economic objectives to
2 advance, enhance, and protect the table grape industry and the
3 greater economic well-being of California.

4 The Commission's motion for summary judgment that the
5 Ketchum Act is constitutional under the "germaneness" test
6 articulated in *Abood* is GRANTED.

7 J. CONCLUSION.

8 For the reasons stated above:

9 1. Plaintiffs' motion for partial summary judgment is
10 DENIED and the Commission's motion for summary judgment is
11 GRANTED that the Table Grape Commission is a governmental entity
12 that engages in government speech within the meaning of *Johanns*
13 *v. Livestock Marketing Ass'n.*, 544 U.S. 550 (2005);

14 2. Plaintiffs' motion for partial summary judgment is
15 DENIED that the Table Grape Commission is governed by *United*
16 *Foods, Inc. v. United States*, 533 U.S. 405 (2001);

17 3. Plaintiffs' motion for partial summary judgment is
18 GRANTED that the *Central Hudson* test, *Central Hudson Gas &*
19 *Electric Corp. v. Public Service Commission of New York*, 447 U.S.
20 557 (1980), has no application to the resolution of Plaintiffs'
21 First Amendment challenge to the Ketchum Act, and the
22 Commission's motion for summary judgment is DENIED;

23 4. The Commission's motion for summary judgment is GRANTED
24 that its activities are germane to valid legislative objectives
25 within the meaning of *Abood v. Detroit Board of Education*, 431
26 U.S. 209 (1977);

5. The Commission's motion for partial summary judgment on the grounds that The Susan Neill Company lacks standing to obtain relief and the Lucas Brothers Partnership lacks standing to obtain prospective as opposed to past relief is GRANTED and Defendant's motion for summary judgment on this issue is DENIED.

6. Counsel for the Commission shall prepare and lodge a form of order setting consistent with this Memorandum Decision within five (5) days following the date of service of this decision.

IT IS SO ORDERED.

Dated: March 28, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE